(1)

90-955

No.—

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALMONT SHIPPING COMPANY, INC.,
A NORTH CAROLINA CORPORATION,
Petitioner,

v.

PETER BROWNE RUFFIN; WARD KING; JOHN E. DYER; WILLIE SLOAN; WILLIAM PINER; HENRY ARRON ROSE, IN THEIR CAPACITIES AS TRUSTEES FOR THE EMPLOYERS-ILA PENSION, WELFARE & VACATION FUND FOR THE NORTH CAROLINA PORTS AREA,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

THOMAS D. WILCOX
Counsel of Record
CHARLES T. CARROLL, JR.
THOMAS D. WILCOX, P.C.
2011 Eye Street, N.W.
Suite 601
Washington, D.C. 20006
(202) 296-3005
Attorneys for the Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

The question presented in this case is whether withdrawal liability (the employer's proportionate share of the plan's unfunded vested benefits) may be assessed under the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1381 *et seq.* (MPPAA or "the Act") against an employer who withdraws from a plan whose vested benefits are fully funded.

THE PARTIES TO THE PROCEEDING BELOW

Almont Shipping Company, Inc., a North Carolina Corporation; Stevedores, Inc., a North Carolina Corporation,*

and

Peter B. Ruffin; Jack Tilley; John E. Dyer; Willie Sloan; William Piner; Nelson Adams; Clemmon L. Jacobs; Robert Hutchens; R. Blaine Brickhouse, in their capacities as trustees for the Employers International Longshoremen's Association AFL/CIO Pension Fund for the North Carolina Ports Area,

and

Gary G. Wise; Perry C. Harvey, Jr.; John Bradshaw, Jr.; Benjamin Flowers; Alton Jernigan; Don Klages; John Mackey; John Roberts; Willie Sloan; Charles Spencer; John Wightman, in their capacities as trustees for the South Atlantic ILA/Employers District Escrow Fund and in their capacities as trustees for the South Atlantic ILA/Employers GAI Fund.

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* Almont Shipping Company, Inc. and Stevedores, Inc. were commonly owned and had no corporate parents or partially owned subsidiaries. Petitioner, Almont Shipping Company, Inc., is the successor to those companies, and itself is a North Carolina corporation, having its principal place of business in Wilmington, North Carolina. It has no corporate parent or partially owned subsidiaries.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit which is the subject of this petition, *Wise v. Ruffin*, 914 F.2d 570 (CA4 1990) decided September 19, 1990 is reproduced in the Appendix at 1a through 26a.

The opinion of the District Court for the Eastern District of North Carolina in *Almont Shipping Co., et al. v. Ruffin et al.* (E.D.N.C.) 88-79-CIV-7 filed July 11, 1989 (unreported) is reproduced in the Appendix at 27a through 32a.

The decision of the arbitrator in the Matter of Arbitration Between Almont Shipping Co., Inc. and Stevedores, Inc. and Employers-ILA North Carolina Ports Area Hourly Paid Employees Pension Plan decided July 3, 1988 is reproduced in the Appendix at 33a through 47a.

JURISDICTION

This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254 to review a decision of the U.S. Court of Appeals for the Fourth Circuit issued on September 19, 1990 in which that court as to Almont and Stevedores reversed a decision of the U.S. District Court for the Eastern District of North Carolina. The district court pursuant to 29 U.S.C. §§ 1401(b)(2) and 1451(c) had reviewed and reversed the decision of an arbitrator made pursuant to 29 U.S.C. § 1401.

STATUTES INVOLVED

Multiemployer Pension Plan Amendments Act of 1980, P.L. 96-364, 94 Stat. 1208, 29 U.S.C. § 1381 *et seq.*

29 U.S.C. § 1381

> (a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.
>
> (b) For purposes of subsection (a)—(1) the withdrawal liability of an employer to a plan is the amount determined under section 1391 of this title to be the allocable amount of unfunded vested benefits, adjusted—. . ."

29 U.S.C. § 1391

(a) The amount of the unfunded vested benefits allocable to an employer that withdraws from a plan shall be determined in accordance with subsection (b), (c), or (d) of this section.

29 U.S.C. § 1393

(c) For purposes of this part, the term "unfunded vested benefits" means with respect to a plan, an amount equal to—(A) the value of nonforfeitable benefits under the plan, less (B) the value of the assets of the plan.

STATEMENT OF THE CASE

Petitioner, Almont Shipping Co., Inc., a North Carolina corporation with its principal place of business in Wilmington, North Carolina, is the successor to Almont Shipping Co., Inc. and Stevedores, Inc. involved in the case below and which were engaged in the business of loading and unloading ships at the Port of Wilmington, North Carolina ("Almont and Stevedores"). Almont and Stevedores were parties to the North Carolina Shipping Association/International Longshoremen's Association ("ILA") labor contract for the period ending September 30, 1986. This labor contract obligated Almont and Stevedores and other signatory employers to pay bargained for wages and benefits to ILA members, including pension contributions payable to the Employer's ILA, AFL-CIO, Pension, Welfare, and Vacation Fund for the North Carolina Ports Area ("the Fund"). This Fund is a regulated Taft-Hartley trust subject to the requirements of the Labor-Management Relations Act, 29 U.S.C. § 151 *et seq.* and the Employee Retirement Income Security Act ("ERISA") 88 Stat. 829, 29 U.S.C. § 1001 *et seq.* The named respondents are trustees of the Fund.

On March 28, 1986 Almont and Stevedores gave timely notice of resignation from the employer designated bargaining agent (the North Carolina Shipping Association) in order to attempt to negotiate a separate and more eco-

nomically viable contract with the ILA locals to become effective October 1, 1986. Despite their good faith efforts, Almont and Stevedores were unable to conclude a new labor contract and, therefore, on September 30, 1986 upon the termination of the then existing multiemployer contract with the ILA locals, stopped using ILA provided labor. However, Almont and Stevedores did not withdraw from the Fund at that time.

On December 31, 1986 the Pension Benefit Guaranty Corporation ("PBGC"), the federal agency established to administer Title IV of ERISA, caused to be published in the *Federal Register*, a Notice of Interpretation ("the Notice," reproduced in Appendix at 48a through 56a) expressing the opinion of the PBGC that MPPAA "does not permit the assessment of withdrawal liability under any statutory allocation method against employers that withdraw from a plan when, as of the end of the preceding plan year, the fund has no unfunded vested benefits" [51 *Federal Register* 47,342 (1986)].

On August 1, 1987 Almont and Stevedores notified the Fund that they were withdrawing from it effective that date. The Fund had no unfunded vested benefits as of the withdrawal date and none at the end of the prior plan year, September 30, 1986. Nevertheless, the next day, August 2, 1987, the Fund notified Almont and Stevedores that they respectively owed the Fund $80,254.00 and $117,751.00 as withdrawal liability pursuant to MPPAA (29 U.S.C. § 1001 *et seq.*) The withdrawal amount calculation method adopted by the fund was the modified presumptive method authorized by 29 U.S.C. § 1391(c)(2).

Almont and Stevedores denied owing any withdrawal liability and demanded arbitration as provided by 29 U.S.C. § 1401. At the same time, pursuant to 29 U.S.C. § 1399(c), they began quarterly withdrawal liability payments to the Fund while pursuing their rights to arbitration and subsequent judicial review.

On July 3, 1988, the arbitrator issued his decision in which he found in favor of the Fund's assertion of withdrawal liability against Almont and Stevedores. On August 1, 1988, Almont and Stevedores brought suit in the U.S. District Court for Eastern District of North Carolina, Wilmington Division, pursuant to 29 U.S.C. §§ 1401 (b)(2) and 1451(c). While the matter was before the court, the Court of Appeals for the First Circuit, on May 9, 1989, issued its decision in *Berkshire Hathaway, Inc. v. Textile Workers' Pension Fund*, 874 F.2d 53 (CA1 1989), in which the court concluded that ". . . Congress did not intend to impose withdrawal liability on employers in a fully funded plan." (*Id.* at 56, opinion reproduced in Appendix at 57a through 64a).

On July 11, 1989, the District Court issued its decision in *Almont Shipping Co. et al. v. Ruffin et al.* (E.D.N.C.) 88-79-CIV-7, 1989 (unreported, see Appendix at 27a through 32a) in which it found that the Fund could not assess withdrawal liability since the Fund had no unfunded vested benefits at the end of the plan year preceding the withdrawal by Almont and Stevedores. The court expressed its concurrence with the First Circuit in *Berkshire Hathaway, supra*, and the 1986 PBGC Notice.

The Fund appealed to the Fourth Circuit Court of Appeals on October 19, 1990. The court *sub nom. Wise v. Ruffin*, 914 F.2d 570 (CA4 1990) reversed the decision of the District Court with respect to the issue of withdrawal liability and remanded that portion of the consolidated case with respect to other parties against which the Fund had asserted a claim for withdrawal liability for a determination as to whether they were statutory employers.[1] As to Almont and Stevedores, their liability to the Fund is settled but for review by this Court. Wherefor, Petitioner has filed this Petition for Certiorari with the Supreme Court of the United States.

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[1] *Wise v. Ruffin*, 716 F. Supp. 213 (E.D.N.C. 1989), decided July 25, 1989. See discussion of the consolidation in *Wise v. Ruffin*, 914 F.2d 510 at 574.

REASONS FOR GRANTING THE WRIT

The reasons why a writ of certiorari should be granted are three. There is a conflict in the U.S. Courts of Appeals on the exact question presented in this case. The case is of general interest and concern to thousands of employees and multiemployer plans and trustees.[2] The decision of the court below is in apparent conflict with a decision of this Court.

The question presented to the Court by this case, while seemingly simple and straight forward, has been answered both "Yes" and "No" by federal courts and federal agencies and begs for the final and definitive answer which only this Court can give. Again, the question is whether withdrawal liability may be assessed under MPPAA against an employer who withdraws from a fully funded plan. Common sense and intuition lead to the conclusion that if the group or plan as a whole owes nothing, then the proportionate share owed by any member of that group or plan must also be nothing. Put another way, if there is no pie to share, then there can be no reason to determine the size of an individual piece.

I. THE CONFLICT IN THE CIRCUITS

Specifically, three U.S. Courts of Appeals in the past five years have had the question before them. The Eighth Circuit in 1986 said the answer is "Yes" in *Ben Hur Construction Co. v. A.S. Goodwin*, 784 F.2d 876 (CA 8 1986). In 1989, the First Circuit said the answer is "No" in *Berkshire Hathaway, supra.* And then in 1990, the Fourth Circuit in *Wise, supra,* said the answer is "Yes."

As noted in *Berkshire Hathaway, supra* at 54, the Court in *Ben Hur* did not have the benefit of the PBGC's 1986 Notice when it acted. Also, it should be noted that

[2] Trustees are at risk of incurring liability for incorrect withdrawal liability assessments, 29 U.S.C. § 1451.

that Court also did not refer to this Court's decision in *PBGC v. Gray, infra.* However, the Berkshire court did and based on its reading of *Gray* and its interpretation of the legislative history of MPPAA stated at 56:

> "We believe that the relevant statutory language supports the position that Congress did not intend to impose withdrawal liability on employers in a fully funded plan."

The court below in *Wise* reached the exact opposite conclusion relying on its own reading of *PBGC v. Gray, infra,* and its decision in *Masters, Mates & Pilots Pension Plan v. USX Corp.*, 900 F.2d 727 (CA 4 1990) which involved the question of actuarial assumptions in the calculation of withdrawal liability from a non-fully funded plan. In *Wise* at page 572, the court below discussed its review in *Masters, Mates, and Pilots,* of the genesis of MPPAA, the meaning of the term "unfunded vested benefits," and the purposes of withdrawal liability. The court, however, failed to note its own analysis of a plan's liability and that of the individual contributing employer with respect to it. What the court said in *Masters, Mates & Pilots* was:

> "When computing an employer's withdrawal liability, a plan sponsor must compute the value of the plan's assets. The employer is assessed a proportionate share of the UVBs (the amount by which the value of vested benefits exceeds the value of plan's assets). The lesser the value of the plan's assets, the more that a withdrawing employer will be charged." (*Id.* at 730)

> "After the present value of the vested benefits is determined, the asset value of the plan is deducted to come up with the amount of unfunded vested benefits, of which a withdrawing employer is assessed a share." (*Id.* at 733)

The only possible conclusion that can be drawn from the above is that if there are no unfunded vested benefits,

then there is no withdrawal liability to assess against an employer who withdraws from such a plan. And yet, the court in *Wise* did approve the assessment of withdrawal liability, creating not only a conflict between the circuits but a conflict within a single circuit, the Fourth.

In Opinion Letter 83-19 of August 11, 1983, the PBGC stated that with respect to one type of statutory formula of calculating withdrawal liability, the answer to the question was "Yes." In 1985 the General Accounting Office (GAO) found that the answer to the question could be "Yes" under three of the four statutory formulae for determining withdrawal liability. [General Accounting Office, Effects of Liabilities Assessed Employers Withdrawing from Multiemployer Pension Plans, GAO/HRD-85-16 (March 14, 1985).] However, subsequent to the GAO report and the decision in *Ben Hur* which relied upon that report, the PBGC in the 1986 Notice said that the court in *Ben Hur* was wrong and that in all cases the answer to the question was "No."

II. THE ISSUE IS OF GENERAL IMPORTANCE AND AFFECTS MANY MORE ENTITIES THAN THE PARTIES

Petitioner is not the only one affected by uncertainty caused by the multiple choice responses to a yes or no question. The 1989 Annual Report of the PBGC, on page 14 stated that there are 8.3 million participants in about 2,300 multiemployer plans which are subject to its administration. Of those 2,300 plans and their contributing members, the PBGC remarked on page 15 of the report that between 1980 and 1989, multiemployer plans that were fully funded for vested benefits increased from 50 to 75 percent. All of those plans or funds have a direct interest in the answer presented to the Court in this case, as will the remaining 25 percent when they become funded.

The increase in fully funded multiemployer plans is attributed by the PBGC to MPPAA. The PBGC then stated that "The withdrawal liability provisions are assuring that employers who leave plans continue to bear their fair share of plan liabilities rather than shift their obligations to the remaining employers or to the PBGC insurance fund." (PBGC 1989 Annual Report at 15)

III. THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT

The decision of the court below, the Court of Appeals for the Fourth Circuit is not in accord with this Court's decision in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984) in which at 725 this Court said:

> "As enacted, the Act requires that an employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the pension plan. This withdrawal liability is the employer's proportionate share of the plan's 'unfunded vested benefits,' calculated as the difference between the present value of vested benefits and the current value of the plan's assets. 29 U.S.C. §§ 1381 and 1391." [See also *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 at 217 (1986).]

The only interpretation that can be drawn is that in order for a withdrawing employer to have a proportionate share of withdrawal liability, the plan must have unfunded vested benefits. If there are none, then the withdrawing employer has no withdrawal liability and leaves behind no obligations to remaining employers or the PBGC insurance fund.

In describing the extent of withdrawal liability this Court in *PBGC v. Gray, supra*, did what any rational person would do when approaching MPPAA. It looked first at 29 U.S.C. § 1381 and discovered the term "withdrawal liability" of an employer to be "the amount deter-

mined under § 1391 of this title to be the allocable amount of unfunded vested benefits . . ." Since neither § 1381 nor § 1391 define the term "unfunded vested benefits," it then turned to 29 U.S.C. § 1393(c) for the definition of the term "unfunded vested benefits" and found that term to be defined as "an amount equal to (A) the value of nonforfeitable benefits under the plan, less (B) the value of the assets of the plan." The Court then combined those two statutory provisions to fully describe an employer's withdrawal liability obligation, if any, to the plan.

Any withdrawing employer would do the same, as did the PBGC and the court in *Berkshire Hathaway*. When such an examination discloses that the plan's assets exceed the value of nonforfeitable benefits and that the plan has no unfunded vested benefits, any reasonable person would conclude that there is then no reason to make any type of individual calculation under § 1391. There simply is no amount from which to make any allocation. When 29 U.S.C. § 1381(b) is combined with § 1393(c), the resultant statute would read:

> "The withdrawal liability of an employer to a plan is the amount determined under § 1391 of this title to be the allocable amount of an amount equal to (a) the value of nonforfeitable benefits under the plan, less (b) the value of the assets of the plan."

Just as does this Court's definition of withdrawal liability in *Gray*, *supra*, a literal combination of the applicable sections of MPAA compels the interpretation that, as to an individual withdrawing employer, there is no allocable or proportionate share to calculate if the plan as a whole has no unfunded vested (nonforfeitable) benefits.

CONCLUSION

The Fourth Circuit's decision distorts the plain meaning of MPPAA and its legislative history. The court read too much into what is a quite simple matter, confusing the broad public policy underlying the concept of withdrawal liability with the specific legislative scheme set by Congress. The decision defies logic and Congressional intent and, to a far greater extent than the court admitted, reveals its affection for a moving method of valuing plan assets, a valuation method not found within the statute and akin to a theory of perpetual employer liability. In fact, the court's decision amounts to a windfall for already fully funded plans. It is, therefore, punitive in nature and may go so far as to violate the Due Process Clause of the Fifth Amendment as suggested by Justice O'Connor in *Connolly, supra* at 228.

This case clearly meets all the criteria set forth in Rule 10.1 of the Rules of the Supreme Court. There is a conflict between circuits; the matter is of wide and general importance which has not been, but should be, settled by this Court.

Wherefor, the Court should grant this petition for a writ of certiorari to the U.S. Court of Appeals for the Fourth Circuit.

Respectfully submitted,

THOMAS D. WILCOX
Counsel of Record
CHARLES T. CARROLL, JR.
THOMAS D. WILCOX, P.C.
2011 Eye Street, N.W.
Suite 601
Washington, D.C. 20006
(202) 296-3005
Attorneys for the Petitioner

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 89-1794, 89-1798 and 89-1820

GARY G. WISE, PERRY C. HARVEY, JR., JOHN BRADSHAW, JR., BENJAMIN FLOWERS, ALTON JERNIGAN, DON KLAGES, JOHN MACKEY, JOHN ROBERTS, WILLIE SLOAN, CHARLES SPENCER, JOHN WIGHTMAN, in Their Capacities as Trustees for the South Atlantic ILA/Employers District Escrow Fund and in Their Capacities as Trustees for the South Atlantic ILA/Employes GAI Fund, *Plaintiffs-Appellees*,

v.

PETER B. RUFFIN, JACK TILLEY, JOHN E. DYER, WILLIE SLOAN, WILLIAM PINER, NELSON ADAMS, CLEMMON L. JACOBS, ROBERT HUTCHENS, R. BLANE BRICKHOUSE, in Their Capacities as Trustees for the Employers International Longshoremen's Association AFL/CIO Pension Fund for the North Carolina Ports Area,

Defendants-Appellants.

ALMONT SHIPPING COMPANY, INC., a North Carolina Corporation, Stevedores, Inc., a North Carolina Corporation, *Plaintiffs-Appellees*,

v.

PETER BROWNE RUFFIN, WARD KING, JOHN E. DYER, WILLIE SLOAN, WILLIAM PINER, HENRY ARRON ROSE, in Their Capacities as Trustees for the Employers-ILA Pension, Welfare & Vacation Fund for the North Carolina Ports Area,

Defendants-Appellants.

ALMONT SHIPPING COMPANY, INC., a North Carolina Corporation, Stevedores, Inc., a North Carolina Corporation,

Plaintiffs-Appellants,

v.

PETER BROWNE RUFFIN, WARD KING, JOHN E. DYER, WILLIE SLOAN, WILLIAM PINER, HENRY ARRON ROSE, in Their Capacities as Trustees for the Employers-ILA Pension, Welfare & Vacation Fund for the North Carolina Ports Area,

Defendants-Appellees.

Argued April 3, 1990

Decided Sept. 19, 1990

As Amended Oct. 12, 1990

Wallace Carmichael Murchison, Michael Murchison, Murchison, Taylor, Kendrick, Gibson & Davenport, Wilmington, N.C., for appellants.

Kevin John Marrinan, Thomas W. Gleason, New York City, George Rountree, III, George Edward Story, Roundtree & Seagle, Wilmington, N.C. (Ernest L. Mathews, Jr., Thomas W. Gleason, New York City, on brief), for appellees.

Before HALL, MURAGHAN and SPROUSE, Circuit Judges.

MURNAGHAN, Circuit Judge:

The primary issue presented for our review in this consolidated appeal concerns the attempted assertion by a multiemployer pension plan against an individual em-

ployer withdrawing from the plan of withdrawal liability as computed under the "modified presumptive method," pursuant to Multiemployer Pension Plan Amendments Act, 29 U.S.C. § 1381 *et seq.* Specifically, we must determine whether the fact that a plan has no "unfunded vested benefits" as of the year preceding an employer's decision to withdraw from the plan immunizes the withdrawing employer from such liability.

I

A

The Employers-International Longshoremen's Association Pension Welfare and Vacation Fund for the North Carolina Ports Area ("the Fund") is a labor-management fund authorized to provide employee benefits pursuant to the Labor-Management Relations Act, 29 U.S.C. § 151 *et seq.*, and the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* The Fund was formed through an agreement between several North Carolina locals of the International Longshoremen's Association ("ILA"), members of the North Carolina Longshoremen's Employers Association, and several stevedoring enterprises doing business in North Carolina. The trustees of the Fund have adopted a pension plan for the purpose of providing retirement and death benefits to eligible employees. The plan is financed by contributions the Fund receives from employers of longshoremen who are members of ILA locals, pursuant to collective bargaining agreements between the employers and the locals. Until August 1, 1987, when they withdrew from the Fund, two such employers were Almont Shipping Company, Incorporated ("Almont") and Stevedores, Incorporated ("Stevedores").[1]

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[1] Although their actual withdrawal did not occur until August 1, 1987, Almont and Stevedores stopped contributing to the Fund on September 30, 1986, the expiration date of the final collective bargaining agreement compelling such contributions.

Several of the Fund's trustees are also trustees of the Employers-International Longshoremen's Association, AFL-CIO, Pension Fund for the North Carolina Area ("the North Carolina Fund"). Like the Fund, the North Carolina Fund provides benefits for North Carolina longshoremen. Under a somewhat more complex arrangement, the North Carolina Fund used to receive contributions from the South Atlantic International Longshoremen's Association/Employers District Escrow Fund ("the Escrow Fund") and the South Atlantic International Longshoremen's Association/Employers Guaranteed Annual Income Fund ("the GAI Fund"). The Escrow Fund and the GAI Fund were, in turn, financed by contributions from waterfront employers. For tax purposes, the funding arrangement was amended on September 30, 1985. As a result of the amendment, contributions that previously were channeled through the Escrow Fund and the GAI Fund are now channeled through local port escrow funds. Since the fiscal year ending September 30, 1985, neither the Escrow Fund nor the GAI Fund has contributed to the North Carolina Fund.

B

To understand the dispute that has arisen among the parties it is necessary to pause to examine the general framework of the Multiemployer Pension Plan Amendments Act, 29 U.S.C. § 1381 *et seq.* ("MPPAA" or "Act"). The Act, which took effect in 1980, was intended "to protect the financial base of pension plans from the erosion that occurred when a participating employer withdrew from a multiemployer pension plan that contained unfunded vested benefits." *Masters, Mates & Pilots Pension Plan v. USX Corp.*, 900 F.2d 727, 730 (4th Cir.1990); *see generally Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 720-25, 104 S.Ct. 2709, 2713-16, 81 L.Ed.2d 601 (1984) (discussing the Act's genesis). Unfunded vested benefits, or "UVBs," are defined as "the amount by which the value of future

benefits vested (nonforfeitable) in covered employees exceeds the value of a plan's assets." *Masters, Mates & Pilots*, 900 F.2d at 730; *see* 29 U.S.C. § 1393(c). MPPAA imposes "withdrawal liability" upon withdrawing employers "so that an employer who withdraws from a pension plan pays its proportionate share of the plan's UVBs." *Masters, Mates & Pilots*, 900 F.2d at 730. Specifically, MPPAA provides:

> If an employer withdraws from a multiemployer plan in a complete or partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

29 U.S.C. § 1381(a). The Act then provides:

> The withdrawal liability of an employer to a plan is the amount determined under section 1391 of this title to be the allocable amount of unfunded vested benefits. . . .

29 U.S.C. § 1381(b)(1). Section 1391 then provides several complex formulas for computing withdrawal liability. One of these formulas, known as the "modified presumptive method," although complex in its particulars, basically computes withdrawal liability as the sum of (a) the withdrawing employer's share of the plan's UVBs as of September 26, 1980, amortized over a fifteen-year period and (b) the employer's share of the plan's total UVBs for all years after September 25, 1980. 29 U.S.C. § 1391(c)(2)(A)-(C).[2]

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[2] Title 29 U.S.C. § 1391(c)(2) provides in full:

> (A) The amount of the unfunded vested benefits allocable to any employer under this paragraph is the sum of the amounts determined under subparagraphs (B) and (C).
>
> (B) The amount determined under this subparagraph is the product of—
>
> > (i) the plan's unfunded vested benefits as of the end of the last plan year ending before September 26, 1980, reduced as if those obligations were being fully amortized in level annual installments over 15 years beginning with

C

When Almont and Stevedores stopped contributing into the Fund and the Escrow Fund and the GAI Fund stopped contributing into the North Carolina Fund, the Fund and the North Carolina Fund (collectively "the Funds") at-

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the first plan year ending on or after such date; multiplied by

(ii) a fraction—

(I) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the last 5 plan years ending before September 26, 1980, and

(II) the denominator of which is the sum of all contributions made for the last 5 plan years ending before September 26, 1980, by all employers who had an obligation to contribute under the plan for the first plan year ending after September 25, 1980, and who had not withdrawn from the plan before such date.

(C) The amount determined under this subparagraph is the product of—

(i) an amount equal to—

(I) the plan's unfunded vested benefits as of the end of the plan year preceding the plan year in which the employer withdraws, less

(II) the sum of the value as of such date of all outstanding claims for withdrawal liability which can reasonably be expected to be collected, with respect to employers withdrawing before such plan year, and that portion of the amount determined under subparagraph (B)(i) which is allocable to employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws and who also had an obligation to contribute under the plan for the first plan year ending after September 25, 1980; multiplied by

(ii) a fraction—

(I) the numerator of which is the total amount required to be contributed under the plan by the employer for the last 5 plan years ending before the date on which the employer withdraws, and

(II) the denominator of which is the total amount contributed under the plan by all employers for the last

tempted to charge withdrawal liability. To determine the withdrawal liability of the departing entities (collectively "the Employers"), the Funds used the modified presumptive method. In the case of each Fund, there were UVBs as of September 26, 1980, but there were no UVBs as of the year preceding the withdrawal of the Employers.[3] Also in the case of each Fund, the UVBs as of September 26, 1980, were so great that when amortized and offset against the surplus of assets as of the year preceding withdrawal, pursuant to the modified presumptive method, the formula resulted in a withdrawal liability for each Employer.[4] Thus, the Funds considered themselves to be entitled to withdrawal liability payments from the Employers.

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5 plan years ending before the date on which the employer withdraws, increased by the amount of any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed by an employer who withdrew from the plan under this part during those plan years.

(D) The [Pension Benefit Guaranty C]orporation may by regulation permit adjustments in any denominator under this section, consistent with the purposes of this subchapter, where such adjustment would be appropriate to ease administrative burdens of plan sponsors in calculating such denominators.

[3] According to the Fund, Almont's amortized allocable share of the UVBs as of September 26, 1980, was $87,792, while Stevedores' share as of that date was $217,918. As for the post-1980 period, during which the Fund was overfunded, Almont's share of the overfunding was $7,538, while Stevedores' share was $110,166.

According to the North Carolina Fund, the GAI Fund's and Escrow Fund's amortized allocable share of the UVBs as of September 26, 1980, was $854,509. As for the post-1980 period, during which the North Carolina Fund was overfunded, the GAI Fund's and Escrow Fund's allocable share of the overfunding was $471,020.

[4] By offsetting the post-1980 overfunding against the pre-1980 underfunding, the Fund computed withdrawal liabilities of $80,254 for Almont and $107,751 for Stevedores. The North Carolina Fund computed a withdrawal liability of $383,489 for the Escrow Fund and the GAI Fund.

Each of the Employers asserted that it owed no withdrawal liability. The Employers did not allege error in the Funds' arithmetic. Instead, the Employers argued that the stautorily prescribed formulas should not apply where, as here, a plan has no UVBs as of the end of the year preceding a participant's withdrawal. Almont and Stevedores also argued that the Fund should have applied a different computation formula. The Escrow and GAI Funds advanced the additional contention that they were not "employers" and were therefore not required to contribute anything, irrespective of whether the absence of UVBs in the year preceding withdrawal precluded application of the formula.

D

Pursuant to 29 U.S.C. § 1401(a), the Fund, Almont and Stevedores submitted their dispute to arbitration. The arbitrator affirmed the Fund's assertion of withdrawal liability. Pursuant to 29 U.S.C. § 1401(b)(2), Almont and Stevedores brought suit in the United States District Court for the Eastern District of North Carolina seeking to vacate the arbitrator's decision. The court, which also had before it a suit brought by the Escrow Fund and the GAI Fund to resolve the dispute with the North Carolina Fund, vacated the arbitrator's decision and held for the Employers in both cases. *See Wise v. Ruffin*, 716 F.Supp. 213 (E.D.N.C.1989) (court's opinion in the North Carolina Fund case). The court agreed with the Employers that, under MPPAA, employers withdrawing from a multiemployer pension plan owe no withdrawal liability when the plan has no UVBs at the end of the year preceding withdrawal. Because of the basis of the court's holding, there was no need to consider either the arguments concerning the particular computation formula selected or the argument of the Escrow Fund and the GAI Fund that they were not employers under MPPAA. *See* 716 F.Supp. at 217.

The Funds have appealed.

II

As is always the case when we are called upon to interpret a statute, we look first to determine if the relevant statutory language is clear. If so, our analysis ordinarily stops and we apply the statute as written. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570, 102 S.Ct. 3245, 3249, 73 L.Ed.2d 973 (1982) ("Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.' ") (citing *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980)). Therefore, we must determine whether the statute and, in particular, § 1381(b)'s provision that "the withdrawal liability of an employer to a plan is the amount determined under section 1391 of this title to be the allocable amount of unfunded vested benefits," are clear.

To support their position, the Employers point to the language in § 1381(b) that provides that withdrawal liability is to be "the allocable amount of unfunded vested benefits." The Employers argue that, because the amount of UVBs as of the end of the year preceding withdrawal was zero, their allocable amount of those UVBs must also be zero. The Funds counter that § 1381(b) specifically provides that the "allocable amount of unfunded vested benefits" is to be "*determined under section 1391.*" Therefore, the Funds conclude, given that the plain language of the statute provides that the allocable amount of UVBs is to be determined under the § 1391 formulas, and that there is no statutory provision calling for disobedience to the formulas merely because the UVBs at the end of the year preceding withdrawal were zero, the plain language of the statute supports their position. The Employers reply that § 1381(b)'s reference to the § 1391 formulas implicitly assumes the existence of UVBs as of the end of the year preceding withdrawal.

We agree with the Funds. The explicit provision that the "allocable amount" of UVBs is to be determined under the § 1391 formulas leads unambiguously to the conclusion that the specific provisions of the formulas, which, in the case of the modified presumptive method, direct consideration of a plan's UVBs as of September 26, 1980, apply. The Employers' argument amounts to a request that we read into the words "allocable amount" the notion that allocable amount is to be based only on the UVBs as of the year preceding withdrawal when those UVBs have a value of zero. Honoring the Employers' request would not constitute resolving a statutory ambiguity but instead would require that we ignore and disregard, substituting a departure for, clear statutory language. Congress did not exercise its option to insert a provision calling for disobedience to the formulas where the UVBs for the year preceding withdrawal are zero. We, of course, have no such option. Because we construe the Employers' argument as an attempt to have us rewrite plain congressional language, we are compelled to reject their argument.

III

It is true that "in rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters, and those intentions must be controlling." *Griffin*, 458 U.S. at 571, 102 S.Ct. at 3250. " 'In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.' " *Philbrook v. Glodgett*, 421 U.S. 707, 713, 95 S.Ct. 1893, 1898, 44 L.Ed.2d 525 (1975) (citing *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122, 12 L.Ed. 1009 (1849)). The language and logic of MPPAA as a whole and MPPAA's legislative history, however, support, rather than contravene, our decision to give effect to the statute's plain language.

A

As even a cursory glance reveals, the formulas prescribed by Congress in § 1391 are meticulous and complex. *See, e.g., supra* n. 2. Where Congress has defined "allocable amount of unfunded vested benefits" with such specificity, we are particularly hesitant to tamper with that definition by reading into the term defined a contrary specific definition such as the one proposed by the Employers, *i.e.*, that "allocable amount of UVBs" means only the UVBs as of the year preceding withdrawal in those situations where there were no UVBs as of that year, but not in other circumstances. Given that "where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general statute," *see Morton v. Mancari*, 417 U.S. 535, 550-51, 94 S.Ct. 2474, 2482-83, 41 L.Ed.2d 290 (1974), it necessarily follows that specific language will not be controlled by general language when that general language is not even explicit. We simply can not infer from the words "allocable amount of unfunded vested benefits" the conclusion that Congress took care to account for all of the contingencies addressed in § 1391 but simply forgot to insert the sweeping provision that the absence of UVBs as of the end of the year preceding withdraw shuts off the elaborate § 1391 formulas. Such an oversight by Congress is even less likely in light of the fact that the absence of UVBs as of the end of the year preceding withdrawal is foreseeable and, therefore, not likely to have escaped congressional attention.[5]

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[5] Ironically, the Employers first caution that we not fall "victim to the not uncommon error of reading technical pension language as if it were ordinary English speech," *see Riley v. MEBA Pension Trust*, 570 F.2d 406, 408-09 (2d Cir. 1977), but they then ask that we give the words "allocable amount of unfunded vested benefits" their "ordinary meaning." *Compare* Brief of GAI Fund and Escrow Fund at 14 *with id.* at 16. We heed the Employers' warning and rely on Congress' technical definition of allocable amount of UVBs instead of inserting the ostensibly more "ordinary" definition that the Employers propose.

Moreover, the § 1391 formulas, as well as other parts of MPPAA, drip with the concept that computations of withdrawal liability often involve consideration of years other than simply the year preceding withdrawal. *See* 29 U.S.C. § 1391(b) (describing the "presumptive method," calling for consideration of plan's UVBs as of September 26, 1980); *id.* § 1391(c)(2) (describing the modified presumptive method, also calling for consideration of plan's UVBs as of September 26, 1980); *id.* § 1391(c)(3) (describing the "rolling-5 method," calling for consideration of contributions made during the five years preceding withdrawal). The Employers would have us hold that Congress intended, though it did not so state, that consideration of those years should suddenly become irrelevant if a plan has no UVBs at the end of the year preceding withdrawal. We think it more likely that Congress would have announced such an intention, at it did on the other occasions within the same section in which it provided that the relevant time for a given calculation was to be the year preceding withdrawal. *See* 29 U.S.C. § 1391(c)(4) (describing the "direct allocation method," explicitly calling for determination of UVBs as of the plan year preceding the year of withdrawal); *see also id.* § 1389(a)(1) (Act explicitly provides that for purposes of *de minimis* rule, UVBs are to be "determined as of the end of the plan year ending before the date of withdrawal").[6]

In addition to its other shortcomings, the Employers' position leads to absurd results. For example, consider a

[6] The Employers make much of the fact that the Act has many other references to an employer's allocable amount of UVBs. That observation adds little to our inquiry since our mission is to determine just what is meant by "allocable amount of UVBs." Given that the words do not mean what the Employers wish they meant (but fail to say) when the Act utters them once, the words do not magically take on the meaning the Employers desire simply because the Act utters them several more times, thus refuting even more starkly the Employers' desired interpretation.

situation where application of one of the statutorily prescribed formulas leads to a finding of one million dollars in withdrawal liability. Under the Employers' interpretation of the Act, if the plan has one penny of UVBs as of the end of the year preceding withdrawal, the withdrawing employer owes one million dollars in withdrawal liability; however, if the plan is one penny wealthier and has zero UVBs as of the end of the year preceding withdrawal, the withdrawing employer owes nothing. It simply can not be that Congress silently intended for such a dramatic shift in liability to be based solely on whether the plan's UVB total falls, however slightly, above or below the zero UVB threshold. The example highlights our more accurate interpretation rejecting the conclusion that Congress intended for the relevance *vel non* of the UVBs as of 1980 to depend on subsequent events such as the existence *vel non* of a positive UVB total as of the year preceding withdrawal. We are not prepared to infer from congressional silence an anomalous conclusion that would constitute a departure from the overall statutory scheme.

The Employers argue that it is the Funds' position that can lead to absurd results. The Employers point to 29 U.S.C. § 1389, which creates a *de minimis* rule that "provides for a reduction of unfunded vested benefits allocable to an employer that withdraws from a plan." *Ben Hur Construction Co. v. A.S. Goodwin,* 784 F.2d 876, 880 (8th Cir.1986). The rule provides that, in certain situations, an employer's withdrawal liability is to be reduced by ¾ of 1 percent of the plan's UVBs determined as of the end of the year preceding withdrawal.[7]

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[7] Section 1389(a) provides in full:

> Except in the case of a plan amended under subsection (b) of this section, the amount of the unfunded vested benefits allocable under section 1391 of this title to an employer who withdraws from a plan shall be reduced by the smaller of—

The Employers ask us to compare the effect of the *de minimis* provision under the Funds' interpretation of the statute in two different situations: "Case A," in which an employer who would otherwise owe ten thousand dollars in withdrawal liability withdraws from a plan with one million dollars in UVBs as of the end of the year preceding withdrawal; and "Case B," in which the facts are the same except the plan has zero UVBs as of the end of the year preceding withdrawal. The Employers note that, under the Funds' position, the Case A employer, though withdrawing from an underfunded plan, will owe *less* in withdrawal liability than the Case B employer who withdraws from a fully-funded plan.[8] The Employers contend that, "[c]learly Congress neither contemplated nor intended such an arbitrary and capricious result." The Employers' claim, apparently, is that Congress could not have intended for the better funded plan to be entitled to a greater withdrawal liability. The Employers point out that if, as they assert, the absence of UVBs as of the end of the year preceding withdrawal precludes the existence of withdrawal liability, a more logical result is reached because the employer in Case B would owe nothing, which, obviously, is less withdrawal liability than what the employer in Case A would owe.

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(1) ¾ of 1 percent of the plan's unfunded vested obligations (determined as of the end of the plan year ending before the date of withdrawal), or

(2) $50,000,

reduced by the amount, if any, by which the unfunded vested benefits allowable to the employer, determined without regard to this subsection, exceeds $100,000.

[8] In Case A, the ten thousand dollars withdrawal liability would be reduced by ¾ of 1 percent of one million dollars, or seven thousand five hundred dollars, creating an ultimate withdrawal liability of two thousand five hundred dollars. In Case B, the ten thousand dollar withdrawal liability would be reduced by ¾ of 1 percent of zero, or zero, creating an ultimate withdrawal liability of ten thousand dollars.

We acknowledge that the Employers' position may make § 1389's application more logical in the context of the hypothetical they present. However, the problems that the Employers highlight under the Funds' interpretation resurface under even the Employers' interpretation whenever the UVBs as of the year preceding withdrawal rise above zero. For example, even under the Employers' interpretaiton, if there was one penny in UVBs as of the end of the year preceding withdrawal, there would be no *de minimis* reduction because ¾ of 1 percent of one penny effectively equals zero. That result, with which the Employers could not reasonably quarrel, would embody the ostensibly unpalatable proposition that, at least insofar as the *de minimis* reduction is concerned, withdrawal liability increases as the plan becomes better funded. Thus, the feature of increasing the *de minimis* reduction as a plan's UVBs increase, and its effect of increasing the withdrawal liability owed to better funded plans, simply inhere in § 1389; the application of the *de minimis* reduction to the Employers' hypothetical is no more illogical than its application to any other set of hypotheticals whose results are compelled by any credible theory of the statute.

It may be that Congress intended to use UVB totals as a measure of a plan's size and reasoned therefrom that the *de minimis* reduction should be greater when employers depart from plans with high UVB totals. Such a conclusion would follow from the assumption that UVB total accurately represents plan size because the larger the plan, the more *de minimis*, *i.e.*, less significant, the impact of any one withdrawal. As noted above, however, we need not delay our analysis with speculation about Congress' motives because to the extent there is any illogic in the application of the *de minimis* rule under the Funds' interpretation, the Employers' interpretation cures that illogic only in the one limited situation in which a plan's UVBs as of the year preceding withdrawal equal

zero. Thus, the Employers' argument here is really no different from the argument, rejected above, that Congress intended, though it did not say so, that a zero UVB total at the end of the year preceding withdrawal deactivates the § 1391 formulas.

In light of the foregoing, the interpretation advanced by the Employers can not be squared with MPPAA as a whole.

B

The plain meaning interpretation advanced by the Funds has the additional virtue of being responsive to MPPAA's purposes as reflected in the statute's legislative history.

Consistent with its overall concern for adequate funding of multiemployer pension plans, Congress intended for MPPAA to eliminate employers' incentives to withdraw from multiemployer plans. *See* H.R. Rep. No. 96-869, 96th Cong., 2nd Sess., pt. 1 (Education and Labor Committee Report), at 67 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin.News 2918, 2935 ("The purpose [of withdrawal liability] is to relieve the funding burden on remaining employers and to eliminate the incentive to pull out of a plan which would result if liability were imposed only on a mass withdrawal by all employers."); *id.*, pt. 2 (Ways and Means Committee Report), at 10, 1980 U.S. Code Cong. & Admin.News at 3001 (Committee concerned that "present law provides an undesirable incentive for employers to withdraw from plans and an unfair burden on the employers who continue to maintain the plans").

Under the interpretation advanced by the Employers, a calculating employer who knew that application of the congressionally prescribed formulas would otherwise lead to a substantial withdrawal liability would be encouraged to withdraw after a year in which the plan had no UVBs. Such an employer would successfully avoid the

effect of the statutory formulas, under the Employers' interpretation, because a zero UVB total for the year preceding withdrawal would deactivate the formulas. The employer would be inclined to withdraw because it would recognize that the value of the UVBs calculated as zero for one year may not be zero the next. We can not accept the proposition that Congress silently intended for a statute otherwise designed to encourage participation in multiemployer plans to have the effect of encouraging withdrawal from such plans. We find more consistency with MPPAA's legislative history in the plain meaning interpretation advanced by the Funds, under which the fact that a plan's UVBs fall to zero for one instant in a continuous period of time does not create an incentive to withdraw because it does not eviscerate withdrawal liability.[9]

MPPAA's legislative history also evinces a concern for the evil of saddling new participating employers with UVB liability created in the plan prior to their arrival. *See* H.R.Rep. No. 96-869, 96th Cong., 2nd Sess., pt. 1 (Education and Labor Committee Report), at 77 (1980), *reprinted in* 1980 U.S.Code Cong. & Admin. News 2918, 2945 (the presumptive method "would impose liability only with respect to those years in which an employer contributes to a plan" and "protects newly entering em-

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[9] The Employers appear to misunderstand the incentive implications of their position. They argue that there is always an incentive for an employer to withdraw if it recognizes that the plan's UVBs have increased over the course of a year. "That 'incentive' is no greater when the withdrawal liability goes from zero to $100,000 than when it goes from $100,000 to $200,000." Brief of GAI Fund and Escrow Fund at 33-34. Our concern is for the effect of the Employers' interpretation in situations where the amount of UVBs slips from one penny to zero and the disproportionate result of reducing withdrawal liability from whatever it may have otherwise been to zero. Under the Employers' interpretation, the one penny change in UVB total creates an incentive to withdraw equal to the liability, suddenly avoidable, dictated by the applicable § 1391 formula.

ployers from unfunded liabilities built up before they entered the plan, in order to reduce the fears of prospective contributors caused by current allocation rules.") ; *see also id.*, pt. 2 (Ways and Means Committee Report), at 15, 1980 U.S. Code Cong. & Admin. News at 3004 (Committee "intends that withdrawal liability rules not deter new employers from entering a multiemployer plan").

This congressional concern provides another explanation for the relevance to the withdrawal liability calculation of prior years. The formula that the Employers would have us deactivate effectively requires existing participating employers to be liable for UVBs incurred prior to the arrival of a new employer. Employers will be less likely to join multiemployer plans if they know that existing employers will avoid liability for UVBs incurred prior to the new participant's arrival simply by departing after a year on which the plan's UVBs have decreased to zero. Such a disincentive to plan participation runs afoul of MPPAA's purpose as expressed in the legislative history.[10]

The Employers read MPPAA's legislative history differently, arguing that the withdrawal liability provisions are intended to protect against only those withdrawals

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[10] The Employers aptly point out the entire purpose of multiemployer pension plans may be undermined if a rigid correlation of benefit to responsible employer were imposed. However, the Act makes plain that such correlations have substantial significance when computing withdrawal liability. *See generally*, 29 U.S.C. § 1391. The principle of allocation of UVBs, which recurs throughout the Act's withdrawal liability provisions, represents a Congressionally mandated balance between the general advantages of pooling and the desirability of correlating benefits to the employer ultimately responsible for those benefits. Thus, we reject the Employers' suggestion that the benefits of pooling create some brooding MPPAA omnipresence that precludes our giving effect to more specific legislative language and history that call for correlating benefits to the employer to whose employee the benefits are owed.

that "threaten vested pension benefits." Brief of GAI Fund and Escrow Fund at 24. "A withdrawal from a multiemployer plan that has no shortfall, as in this case, has no deleterious financial effect on the plan's ability to pay benefits and, therefore, imposes no financial burden on the [Pension Benefit Guaranty Corporation]. The legislative history contains no indication whatsoever that Congress was concerned with employer withdrawals under these circumstances." *Id.* at 24-25.

We reject the Employers' analysis of the legislative history for several reasons. First, their analysis is unresponsive to our observations that their interpretation, as compared to the Funds' plain meaning interpretation, encourages withdrawals and creates a disincentive to plan participation. Second, their analysis characterizes the legislative history too narrowly by implying that Congress was concerned exclusively with troubled plans. Indeed, if Congress' concern was so narrow, it is that much more peculiar that there is no provision explicitly deactivating the formulas when withdrawal follows a fully funded year. Most importantly, however, to give force to the Employers' respective interpretation of the legislative history would make withdrawal liability imposition litigious and unworkable. For if Congress did not intend for withdrawal liability to be imposed on a fully funded plan, it probably did not intend for such liability when the plan was only one penny short of fully funded status. And what about a plan with one dollar in UVBs or one hundred dollars in UVBs or one thousand dollars in UVBs? If we were to incorporate into our analysis the Employers' reading of the legislative history, we would be forced to draft a rule to accompany our holding in which we, as a court, would develop a formula for determining when a given withdrawal does or does not really "threaten vested pension benefits." Or, we would have to draft a rule providing that withdrawal liability may be imposed only for "those withdrawals that would have the

result of foisting the burden of funding onto remaining employers and thus would create an incentive for other employers to withdraw," *see* Brief of GAI Fund and Escrow Fund at 29, and we could leave the elaboration of the standard to future litigation. Indeed, if we should allow the general principle that withdrawal liability should be no greater than the threat posed by a given withdrawal as determined by the amount of UVBs as of a single point in time, *i.e.*, the year preceding withdrawal, we should do away with the § 1391 formulas altogether and require that the withdrawal liability equal some allocable portion of the UVB total as of that year. Until we were elected to Congress, such finagling with the Act will remain beyond our authority.

C

Finally, we observe that, rather than leading to absurd results, the plain language interpretation advanced by the Funds has an additional salutary effect, which, admittedly, is not discussed in MPPAA's legislative history.

In *Masters, Mates & Pilots*, we noted the legitimacy of the moving market average approach to asset valuation, under which the value of an entity's assets at any one time is determined by examining the market value of the entity's assets over an extended period of time. *See* 900 F.2d at 730-33. Such an approach "moderates the impact of severe fluctuations in the stock market," *id.* at 731, by recognizing the fact that values fluctuate over time. A value showing everything vested at one point in time may change so as to demonstrate a substantial lack of vesting at some future point in time. Spreading the valuation process also serves to spread the risk.

Congress' decision to provide for consideration of UVBs in prior years seems to incorporate the notion that a plan's health is most safely valued by a method that looks not merely to the amount of UVBs at one point in time (the end of the year prior to withdrawal), but instead

looks to the amount of UVBs over a longer period of time. That approach avoids unfortunate results such as a sudden skyrocketing of a plan's assets, leading to an illusory appearance of an absence of UVBs, followed by an equally sudden fall in asset value that reveals that the plan is actually underfunded. *Cf. Republic Industries v. Teamsters Joint Council*, 718 F.2d 628, 632 n. 2 (4th Cir. 1983) (noting contention that unfunded vested liability may result when "the assets of the fund . . . diminish as a result of market forces, general economic conditions or imprudent investments"), *cert. denied*, 467 U.S. 1259, 104 S.Ct. 3553, 82 L.Ed.2d 855 (1984). Although we rest our decision most securely on MPPAA's plain language, logic, and legislative history, we derive additional assurance from the reasonableness, from the perspective of economic theory, of consideration of plan health over a range of years, rather than at one discrete point in time.

IV

We recognize that our conclusion contradicts the position of the Pension Benefit Guaranty Corporation ("PBGC"), *see* Notice of interpretation, 51 Fed.Reg. 47,342 (1986), and that the PBGC ordinarily has considerable authority for purposes of interpreting MPPAA. *See Belland v. Pension Benefit Guaranty Corp.*, 726 F.2d 839, 843 (D.C.Cir.) (citations omitted), *cert. denied*, 469 U.S. 880, 105 S.Ct. 245, 83 L.Ed.2d 183 (1984). In addition, at first blush, our conclusion appears to run counter to the conclusion reached by the First Circuit in *Berkshire Hathaway, Inc. v. Textile Workers Pension Fund*, 874 F.2d 53 (1st Cir.1989), although it does appear to find support in the conclusion of the Eighth Circuit in *Ben Hur Construction Co. v. A.S. Goodwin*, 784 F.2d 876 (8th Cir.1986). We conclude, however, that the PBGC is not entitled to deference in this context and that the First Circuit's conclusion in *Berkshire Hathaway* should not disurb our result.

A

In its most recent pronouncement on the matter, found in a notice of interpretation, the PBGC has changed its position and ruled that an employer that withdraws from a plan that was fully funded at the end of the year preceding withdrawal owes no withdrawal liability, irrespective of the result of application of the statutorily prescribed formulas. *Compare* Notice of interpretation, 51 Fed.Reg. 47,342 (1986) (stating current position) *with* PBGC Opinion Letter 83-19 (August 11, 1983) (stating former position). The notice concludes that "while [29 U.S.C. § 1391] is ambiguous as to whether an employer that withdraws from a plan that has no unfunded vested benefits as of the end of the preceding plan year may incur withdrawal liability, reference to the legislative history and other provisions of Title IV clears up this ambiguity and compels the conclusion that no withdrawal liability is to be assessed in such a case." 51 Fed.Reg. at 47,344.

Our review of the PBGC's current interpretation of the law is guided by several familiar principles. First, "[i]f the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . [I]f the statute is silent or ambiguous with respect to the specific issue, the questions for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984) (footnotes omitted). Second, "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistehtly held agency view." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30, 107 S.Ct. 1207, 1221 n. 30, 94 L.Ed.2d 434 (1987) (citations omitted).

Given such a standard of review, we elect not to defer to the PBGC's current position. The cornerstone of the PBGC's position and the origin of the PBGC's ostensible entitlement to deference under *Chevron* lie in the proposition that the statute is ambiguous. To us, nothing could be clearer than § 1391(c)(2)(B)'s explicit directive to include in the withdrawal liability computation a portion of an amortization of "the plan's unfunded vested benefits as of the end of the last plan year ending before September 26, 1980." Nothing in the PBGC's notice persuades us that we have overlooked some source of ambiguity. The notice concedes that the PBGC's former position, with which we do agree, was at least "apparently straightforward." 51 Feg.Reg. at 47,343. However, the notice asserts in one terse conclusory sentence, "the use of the term 'allocable' at least suggests the prior existence of unfounded vested benefits to be allocated." *Id.* This statement ignores the elaborate and unambiguous statutory definitions of "allocable" that § 1391 provides and essentially begs the ultimate question, conclusively answered by the statute, of the date at which the existence of UVBs is to be measured. Yet, the notice immediately proceeds to employ various tools of statutory interpretation that are not applicable to unambiguous statutes such as the one it was analyzing. Given the clarity of the statute, we believe that the notice should be viewed merely as a statement of why the PBGC believes Congress should amend the statute and not as an interpretation of an ambiguous provision that is entitled to *Chevron* deference. *See Chevron*, 467 U.S. at 843, n. 9, 104 S.Ct. at 2781, n. 9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

B

In *Berkshire Hathaway*, the First Circuit found that MPPAA did not permit imposition of withdrawal liabilty under the computation method employed by the plan in that case, where the plan was fully funded as of the end of the year preceding withdrawal. However, unlike in the case before us, in which the plan has used the modified presumptive method, the plan in *Berkshire Hathaway* employed a variation of the "direct allocation method," *see* 29 U.S.C. § 1391(c)(4), as the means of computing withdrawal liability. In contrast to the modified presumptive method, the direct allocation method used in *Berkshire Hathaway* does not so explicitly require inclusion of UVB amounts for a year other than the year immediately preceding withdrawal. To the contrary, the statutory description of the method used by the plan in *Berkshire Hathaway* contains explicit directives to base computations upon the year preceding withdrawal.[11] The particular provision that formed the basis of the plan's argument in *Berkshire Hathaway* provided:

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[11] For example, the language describing the general formula provides:

> The amount of the unfunded vested benefits allocable to an employer under this paragraph is equal to the sum of:
>
> (i) the plan's unfunded vested benefits which are attributable to participants' service with the employer *(determined as of the end of the plan year preceding the plan year in which the employer withdraws)*, and
>
> (ii) the employer's proportional share of any unfunded vested benefits which are not attributable to service with the employer or other employers who are obligated to contribute under the plan in the plan year preceding the plan year in which the employer withdraws *(determined as of the end of the plan year preceding the plan year in which the employer withdraws)*.

29 U.S.C. § 1391(c)(4)(A) (emphasis added).

> The plan's unfunded vested benefits which are attributable to participants' service with the employer is the amount equal to the value of nonforfeitable benefits under the plan which are attributable to participants' service with such employer . . . decreased by the share of plan assets . . . which is allocated to the employer.

29 U.S.C. § 1391(c)(4)(B); *see* 874 F.2d at 55-56. The plan in *Berkshire Hathaway* argued from congressional silence that it would be wrong to conclude that the quoted provision assumes the existence of some plan unfunded vested benefits before computing each employer's share. Thus, unlike the Funds before us, who simply ask that we apply pellucidly clear statutory directives to include UVBs as of 1980 in the withdrawal liability calculation, the plan in *Berkshire Hathaway* asked the court to inject a certain meaning into language that was, at best, from the plan's perspective, ambiguous.

Thus, the conflict between our holding and that of the distinguished panel in *Berkshire Hathaway* may be more apparent than real. Given the difference in the formulas at issue, the First Circuit's application of the "equally plausible and perhaps more intuitive," *see* 874 F.2d at 56, interpretation of the PBGC is not necessarily at odds with the conclusion we reach. Undeniably, the *Berkshire Hathaway* court believed that the PBGC position was entitled to deference. *See* 874 F.2d at 55. However, the court's decision ultimately rested upon its conclusion that the PBGC's position comported with the statutory language at issue in the case before it. *See id.* ("*Perhaps most importantly,* PBGC's interpretation is consistent with the statutory language, and Congress expressly delegated substantial regulatory authority to PBGC relating to withdrawal liability.") (emphasis added). Accordingly, our conclusion will not be shaken by the fact that the First Circuit, in another context, deferred to a PBGC notice of interpretation to which we, in a different

context, choose not to defer.[12] And, of course, our detailed treatment of *Berkshire Hathaway* should not detract attention from the fact that the Eighth Circuit interpreted the direct allocation method in the same manner in which we interpret the modified presumptive method, albeit without the PBGC opinion before it. *See Ben Hur* (decided prior to the PBGC's shift in positions).

V

For the foregoing reasons, the judgments of the district court are

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.[13]

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[12] Our comments here should not be construed as an endorsement of the ultimate conclusion reached in *Berkshire Hathaway*. Nor, of course, do we mean to imply that the *Berkshire Hathaway* court definitely would endorse the result we reach here. Because neither issue is presented, our comments as to each are merely *dicta*, relevant here only insofar as they address the apparent tension between the two opinions.

[13] Almont and Stevedores, who won below but now have lost on appeal, have appealed the district court's refusal to award them attorney's fees. Given the nature of the controversy before us, we affirm that refusal.

Because the district court made no findings on the matter, we leave for the district court on remand the issue of whether the GAI Fund and the Escrow Fund, even assuming, as herein indicated, that vesting is not computed on the basis of a single prior year, are "employers."

Also, the district court will have to make findings in both cases as to the amount of withdrawal liability owed.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WILMINGTON DIVISION

No. 88-79-CIV-7

ALMONT SHIPPING COMPANY, *et al.*,
Plaintiffs

v.

PETER BROWNE RUFFIN, *et al.*,
Defendants

ORDER

[Filed Jul. 11, 1989]

This matter comes before the court upon defendants' motion for summary judgment. Plaintiffs brought this action pursuant to 29 U.S.C. § 1401(b)(2) and 29 U.S.C. § 1451 seeking to vacate the arbitrator's award rendered on July 3, 1988. For the reasons set forth below, the defendants' motion is denied.

The First Circuit Court of Appeals recently issued a ruling dealing with the issue of whether withdrawal liability may be assessed under the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C. § 1381 *et seq.*, against an employer who withdraws from a fully funded plan. *Berkshire Hathaway v. Textile Workers Pension Fund*, No. 88-1543 (1st Cir. May 9, 1989). The First Circuit held that withdrawal liability cannot be imposed on an employer who withdraws from a fully funded plan. This court agrees with both the ruling and the reasoning in *Berkshire.*

The reasoning in the *Berkshire* opinion is based on two propositions: deference should be given to the implementing agency's interpretation of a statute when it it reasonable, and that the statutory language and legislative history support a finding that no withdrawal liability exists when a plan is fully funded.

The Pension Benefit Guaranty Corporation (PBGC) came into existence pursuant to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, *et seq.*, in 1974. The PBGC stated in its "Notice of Interpretation":

> The fundamental purpose of withdrawal liability is to prevent the burden of unfunded benefits from falling on a shrinking contribution base and possibly accelerating the exodus of employers from the plan. In situations where this purpose is not served, the reason for withdrawal liability disappears.
>
> . . . .
>
> ERISA does not permit the assessment of withdrawal liability under *any* statutory allocation method against employers that withdraw from a plan when, as of the end of the preceding plan year, the plan has no unfunded vested benefits.

51 Fed. Reg. 47,344 (1986) (emphasis added.)[1]

The court is persuaded that deference to the PBGC's interpretation is appropriate. As the *Berkshire* court stated:

> The PBGC, a product of the original ERISA legislation, has extensive experience in the area, and has

---

[1] It should be noted that under the interpretation of the PBGC adopted by this court and the *Berkshire* court, the statutory method of allocation chosen by a plan does not affect the court's determination of whether an employer should be assessed withdrawal liability. In other words, the court looks only to the preceding plan year to determine if the plan has unfunded vested benefits.

> had a central role in the implementation of ERISA from the outset. The MPPAA was founded on a specific study and accompanying recommendations by the PBGC [.] It is evident that the withdrawal liability provisions of the MPPAA were specifically directed toward preserving the resources of the PBGC in anticipation of extending its insurance coverage to multiemployer plans. The PBGC, after a fifteen-month notice and comment period, promulgated its Notice of Interpretation, indicating that this concern is simply not implicated where a plan's vested benefits are fully funded.

Slip op. at 6-7.

The court finds that the PBGC's interpretation is consistent with the statutory language. The language of the statute implicitly assumes that a plan has unfunded vested benefits. *See, e.g.*, 29 U.S.C. § 1391(c)(4)(B). This interpretation has been adopted by the PBGC:

> The use of the term "allocable" [29 U.S.C. § 1381, 1391] at least suggests the prior existence of unfunded vested benefits to be allocated. Further, the discussion of withdrawal liability in the legislative history of the MPPAA strongly reinforces this suggestion. For example, Senator Javits, one of the Senate sponsors of MPPAA, stated: 'Under the bill, an employer who withdraws from a multiemployer plan would be liable to the plan for a *proportionate share of the unamortized amount of the plan's unfunded vested benefits.*'

Notice of Interpretation, 51 Fed. Reg. 47,343 (1986) (citing 126 Cong. Rec. 20,178 (1980)) (emphasis added).

The only appellate case contrary to *Berkshire* is *Ben Hur Construction v. A. S. Goodwin*, 784 F.2d 876 (8th Cir. 1986). As the *Berkshire* court aptly pointed out, the *Ben Hur* court did not have the benefit of the PBGC's Notice of Interpretation, and instead based its ruling, in

part, on a General Accounting Office report consistent with the PBGC's earlier position on the issue. 784 F.2d at 879 & n. 4. It is interesting to note that the GAO report suggested that Congress amend the statute to exempt employers from withdrawal liability where a plan is fully funded, concluding: "Such an exemption would be consistent with withdrawal liability based on a share of the plan's unfunded vested benefits and should have little effect on the plan or its contributing employers." General Accounting Office, Effects of Liabilities Assessed Employers Withdrawing from Multiemployer Pension Plans 40, GAO/HRD-85-16 (Mar. 4, 1985).

The court is mindful that inconsistency in agency interpretation of a statute is grounds for according less deference to the agency's interpretation. *See, e.g., Immigration and Naturalization Service v. Cardoza Fonseca*, 480 U.S. 421, 107 S.Ct. 1207, 1221 n. 30 (1987). Nonetheless, the court finds that the agency's current position is better reasoned and more consistent with congressional intent, i.e., to protect pension plans from withdrawals that could jeopardize their financial stability, than its earlier position.

The court finds that the plan/fund as a whole had no unfunded vested benefits on September 30, 1986, the end of the plan fiscal year immediately before the withdrawal and thus cannot subject the plaintiffs to withdrawal liability. Accordingly, the defendants' motion is DENIED, the arbitrator's award is VACATED, and this action is DISMISSED.

SO ORDERED this 3rd day of July, 1989.

/s/ Terrence W. Boyle
TERRENCE W. BOYLE
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

Case Number: 88-79-CIV-7

ALMONT SHIPPING COMPANY, INC.,
A NORTH CAROLINA CORPORATION

STEVEDORES, INC.,
A NORTH CAROLINA CORPORATION

v.

PETER BROWNE RUFFIN, WARD KING, JOHN DYER, WILLIE SLOAN, WILLIAM PINER, and HENRY ROSE, in Their Capacities as Trustees of the Employers-ILA Pension, Welfare & Vacation Fund For the North Carolina Ports Area

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JUDGMENT IN A CIVIL CASE

—— JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

xxx DECISION BY COURT. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the defendants' motion is denied, the arbitrator's award is vacated, and this action is dismissed.

THE ABOVE JUDGMENT WAS ENTERED TODAY, July 11, 1989, AND A COPY MAILED TO:

Mr. George Rountree, III
Attorney at Law
P. O. Box 1409
Wilmington, North Carolina 28401

Mr. Wallace C. Murchison
Attorney at Law
16 North Fifth Avenue
Wilmington, North Carolina 28401

Date July 11, 1989

Wilmington, North Carolina

J. RICH LEONARD
Clerk

/s/ E. L. Eggleston
ELIZABETH L. EGGLESTON
(By) Deputy Clerk

IN THE MATTER OF ARBITRATION BETWEEN
ALMONT SHIPPING CO., INC., and STEVEDORES, INC.

and

THE EMPLOYERS-ILA NORTH CAROLINA PORTS AREA
HOURLY PAID EMPLOYEES PENSION PLAN.

Hearing: April 26, 1988, New Hanover County Judicial Building, Wilmington, North Carolina

For Almont and Stevedores: George Roundtree, III, Esq.

For the Plan: Wallace C. Murchison, Esq.

Arbitrator: William P. Hobgood

OPINION AND AWARD

Hearing:

The first and only day of testimony was conducted on April 26, 1988, at the New Hanover County Judicial Building in Wilmington, North Carolina.

Stipulation of Facts:

Prior to hearing, the parties entered into the following stipulation of Agreed Facts:

1. The Employers-ILA Pension, Welfare and Vacation Fund for the North Carolina Ports Area (the Fund) was created pursuant to that certain Agreement and Declaration of Trust (Agreement and Declaration of Trust) dated October 11, 1957, by and between employer members of the North Carolina Longshoremen's Employers Association, a group of stevedore operators doing business in North Carolina, and Locals 1426 and 1766, Inter-

national Longshoremen's Association, Wilmington, North Carolina, Locals 1807 and 1847, International Longshoremen's Association, Morehead City, North Carolina, and Local 1838, International Longshoremen's Association, Southport, North Carolina, and six individuals as trustees (three employer trustees and three union trustees), and pursuant to certain collective bargaining agreements between such employers and such locals of the International Longshoremen's Association (ILA). The Fund is a trust fund created under and to be administered in accordance with 29 U.S.C. ss 186 and 29 U.S.C. sec. 1001 *et seq.*

2. At all times material to this arbitration, Almont and Stevedores were engaged in the business of stevedoring cargoes from oceangoing vessels, including barges, at the port of Wilmington, North Carolina. Almont has also provided line handling services.

3. The Employers-ILA Hourly Paid Employees Pension Plan for the North Carolina Ports Area (the Plan) was adopted on March 14, 1958, by the then Trustees of the Fund, pursuant to the powers granted such Trustees under the Agreement and Declaration of Trust for the purpose of providing retirement and death benefits to eligible employees (and their spouses) of employers who are parties to the Agreement and Declaration of Trust and the collective bargaining agreements.

4. The Fund is a labor-management fund authorized to provide employee benefits pursuant to the Labor-Management Relations Act, 29 U.S.C. sec. 151 *et seq.*, and pursuant to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. sec. 1001 *et seq.* The Plan is to be administered in accord with the Agreement and Declaration of Trust, as amended, the Plan, as amended, and applicable federal and state law. The Agreement and Declaration of Trust was amended on January 15, 1959, June 22, 1959, June 25, 1975, and January 7, 1981. The Plan is a multiemployer pension

plan under the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA).

5. The Fund received monies regularly from employers of longshoremen who were generally members of one or more local unions of the ILA, pursuant to collective bargaining agreements between said employers and such local unions. Those collective bargaining agreements have regularly specified the amount or amounts of contributions by each such employer to the Fund. For many years, Almont and Stevedores were employers of longshoremen in the North Carolina ports area, were parties to ILA collective bargaining agreements, and made contributions to the Fund as required by such agreements.

6. The Agreement and Declaration of Trust provides in the first recital as follows:

> "WHEREAS, the Employer and the Union, pursuant to their collective bargaining agreements, effective October 11, 1957, have agreed to establish pension, welfare and vacation plans, to be administered jointly by the Trustees named and appointed herein, the total cost of said pension, welfare and vacation plans not to exceed the amount per man hour stipulated in said collective bargaining agreements, to be paid by the employers signatory to said contracts;"

7. The Agreement and Declaration of Trust further provides, in pertinent part, in Paragraph 5, as follows:

> "The Trustee shall have full power and authority to apportion and allot (and in their discretion to change the appointment and allotment) to each plan a porportion of the Employer's total contribution, but contributions once received allotted and dedicated to a particular Plan shall not thereafter be changed or transferred to another Plan.
>
> Subject to the provisions of this agreement, the Trustees shall also have full power and authority to

formulate the Pension Plan, the Welfare Plan, and the Vacation Plan provided for under the said collective bargaining agreements. The Trustees, in the formulation of said plans, shall have no authority to commit the Union or the Employer for amounts other than financial resources of the Trust Fund and Employer contributions stipulated in their current bargaining agreements."

8. The last ILA collective bargaining agreement to which Almont and Stevedores were signatories expired September 30, 1986, and Almont and Stevedores have paid to the Fund all contributions required by that collective bargaining agreement and any earlier agreements.

9. Notwithstanding Almont's and Stevedores' efforts of bargaining with Local 1426 and Local 1838 of the ILA, Almont and Stevedores and Local 1426 and Local 1838 of the ILA have been unable to reach collective bargaining agreements since October 1, 1986, and no such collective bargaining agreement now exists between Almont or Stevedores and such locals.

10. On August 1, 1987, Almont and Stevedores each withdrew completely as an employer-participant in the Plan and in the Fund. These companies have permanently ceased to have an obligation to contribute to the Fund for the benefit of the Plan.

11. The Trustees notified Almont by letter dated August 2, 1987, that Almont owed to the Plan, as withdrawal liability under Sections 4201 and 4202 of ERISA, 29 U.S.C. sec. 1381 and 1382, the sum of $80,254.00; and the Trustees notified Stevedores by letter dated August 2, 1987, that Stevedores owed to the Plan, as withdrawal liability under Sections 4201 and 4202 of ERISA, 29 U.S.C. sec. 1381 and 1382, the sum of $117,751.00. Both Almont and Stevedores, as required by ERISA, have begun to make the scheduled quarterly payments as demanded by the Trustees, but have reserved all their

rights to contest the assessment itself and the amount thereof. Such payments have been made as follows: Installment due September 30, 1987, paid November 17, 1987. Installment due December 31, 1987, paid December 28, 1987. Installment due March 31, 1988, paid March 22, 1988.

12. Almont and Stevedores contend that they have incurred no withdrawal liability and that they owe the Trustees nothing as a result of their withdrawal from the Plan, and that the payments made by each of them, plus interest from the date of each payment, should be refunded by the Trustee to Almont and Stevedores respectively.

13. Booke & Company, Inc., consulting actuaries for the Plan, calculated the withdrawal liability of Stevedores and Almont and other employers for the period of October 1, 1986 through September 30, 1987. Such calculation is shown in the actuarial report of Booke & Company, Inc. to the Plan for that period. Booke & Company made the calculation using the "modified presumptive method", which is the method referred to in Section 10.8 of the Plan and is the method described and authorized in Section 4211(c)(2) of ERISA, 29 U.S.C. sec. 1391(c)(2). If it is determined that Almont and Stevedores owe withdrawal liability to the Plan, the amounts calculated by Booke & Company are accurate.

14. As shown by the actuarial report of Booke & Company, Inc. for the Plan year October 1, 1986 through September 30, 1987, the Plan as a whole had no unfunded vested benefits as of September 30, 1986, the end of the plan year preceding the date of withdrawal of Almont and Stevedores. The report showed that individual employers did have withdrawal liability as of that date.

ISSUES:

A. Did the Trustees of the Plan change the method of calculating the withdrawal liability for employers

from the modified presumptive method to the rolling five method?

B. If the method of calculating employer withdrawal liability was not changed, can the Trustees of the Plan nevertheless assess a withdrawal liability against Almont and Stevedores although the Plan at the time had no unfunded vested benefits?

DISCUSSION:

Issue A:

Section 1391 of the Employee Retirement Income Security Act of 1974, as amended (ERISA), 29 U.S.C. sec. 1001 *et seq.*, provides five alternative methods for determining the liability of an employer who withdraws from a multiemployer pension plan, i.e., the presumptive method, the modified presumptive method, the rolling five method, the direct attribution method, and a special method approved by the Pension Benefit Guaranty Corporation (PBGC) 29 U.S.C. secs. 1391(b), (c)(1), (c)(2), (c)(3), (c)(4), and (c)(5).

The Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. sec. 1381 *et seq.* (1982) (MPPAA), required trustees of mutiemployer plans to select a method of calculating employer withdrawal liability by May 1, 1983. On April 6, 1983, in response to this requirement, the Trustees of the Employers-International Longshoremen's Association, AFL-CIO, Pension, Welfare and Vacation Fund for the North Carolina Ports Area, a multiemployer plan, as that term is defined by ERISA, amended the Pension Plan of the Fund to provide for the modified presumptive method for calculating the liability of a withdrawing employer participant. This change was accomplished by a formal resolution of the Trustees and executed Amendment No. 42 to the Plan, dated April 6, 1983. (Trans. 55, 59, 60) At the time of the adoption of the Amendment, the Plan had unfunded vested benefits.

At meetings subsequent to the adoption of the modified presumptive method, some of the Trustees expressed concerns that the use of certain methods of calculating withdrawal liability could have a disproportionate impact upon some of the employers, because liability could result, even though the Plan as a whole was fully funded. (Trans. 15-16, 21-22) However, no formal action was taken by the Trustees to change the method of calculating withdrawal liability after adoption of Amendment No. 42. (Trans. 21)

At a meeting held on June 17, 1986, four of the six Trustees were present, two each of the employer and employee representatives. According to the minutes of the meeting, the Trustees disussed whether it was appropriate to retain the modified presumptive method which resulted in withdrawal liability for employers with unfunded vested benefits who participated in the Plan prior to September 26, 1980, even though the Plan's vested benefits were fully funded. The Trustees were informed by Mr. Robert Carlisle, legal consultant with Booke & Company, who served as actuaries to the Plan, that the modified presumptive method resulted in withdrawal liability to pre-September 26, 1980, employer participants although the Plan was fully funded, and that the rolling five method would not impose such a liability. (Trans. 27, 68-69, 90-91)

The evidence presented at the hearing indicated that the Trustees were interested in obtaining information as to what steps were necessary to amend the Plan, i.e., whether the PBGC specifically had to approve the change and what costs would be involved. However, the documentary evidence and testimony were clear that no formal actions were taken by the Trustees to change the method of calculation. (Trans. 91-92; Doc. No. 17)

Mrs. Estell C. Lee, one of the Plan's Trustees and president of Almont Shipping Co., Inc., and Stevedores, Inc., the movants in this matter, attended the June 17

meeting. She testified that all four of the Trustees present at the meeting agreed to change the existing method of calculating liability. (Trans. 27, 28) However, even if we accept the contention of Almont and Stevedores that the Trustees had orally decided to make such a change in method at the June 17 meeting, the evidence presented establishes that no change, in fact, occurred.

It must be remembered that the Fund, as an artificial entity, can operate only through the formal actions of its agents. Therefore, it was not enough for the Trustees of the Fund to reach a consensus to change the method of calculating employer withdrawal liability. In order to effectuate such a change, it was necessary for the Trustees to do so in a formal manner, i.e., by passing a resolution containing appropriate Plan amendatory language.

Even the testimony of Mrs. Lee, the principal spokeswoman for the movants, supports this conclusion. On cross examination, she agreed that the Trustees regularly made decisions and took actions at their meetings by motions that were made, seconded and adopted. (Trans. 44) She could not remember when any verbal amendments were made to the Plan. (Trans. 60) She testified that she knew of no motions made by the Trustees at the June 17 meeting which changed the method of computing withdrawal liability. (Trans. 70) When Amendment 45, which would have changed the method of calculating withdrawal liability was moved for adoption at the September 24, 1986, meeting, she testified that the employee representatives voted against it. (Trans. 79)

The clearest evidence that the Trustees did not change the calculation method came from Mrs. Lee in response to questioning on redirect. She said,

> Well, until an amendment is actually signed by the trustees, no matter how much we discussed it or talked about it, it is not actually applicable and we did agree on many times before that we would, in

fact, change the method of computing withdrawal liability and it only was the process of writing up an amendment, as suggested by Booke & Company, our actuary, and actually entering that document to make everything official. Until there was a written document, then there was no agreement. (Trans. 82)

The most that can be said for Almont and Stevedore's position is that the evidence introduced at the hearing as to what transpired at the June 17 meeting seems to suggest that some understanding had been reached among the Trustees at the June 17 meeting to change the method of calculating withdrawal liability. However, even this impression of unanimity was not confirmed by the testimony of Mr. Peter Browne Ruffin, another employer Trustee representative who also attended the June 17 meeting. When asked whether he expected all of the Trustees would sign Amendment No. 45, which had been drafted by the Plan's attorney, at the September 24, 1986 meeting, the following colloquy occurred,

Q: My question is, when you got the document in August of 1986, did you not believe that the position of all the trustees was such that they would sign it?

A: I hoped that they would.

Q: Well, you believed they would.

A: I did not know positively that they would, but I hoped that they would. (Trans. 118-119)

Based upon the documentary evidence and oral testimony introduced at the hearing, I conclude that the Trustees of the Fund did not change the method of calculating the withdrawal liability for employers from the modified presumptive method to the rolling five method.

Issue B:

Almont and Stevedores joined the Plan in 1971. (Almont Shipping/Stevedores Brief, hereinafter referred

to as A/S Brief, p. 3). Both were parties to the North Carolina Shipping Association/International Longshoremen's Association (ILA) longshoring contract for the term ending September 30, 1986. (Fact No. 8) On March 28, 1986, they withdrew as members of the North Carolina Shipping Association to negotiate separately with the ILA for a labor contract beginning October 1, 1988. (A/S Brief, p. 3) However, because no accord was reached, neither company used union longshoring labor since September 30, 1986). (A/S Brief, ps. 3-4) They withdrew from the Plan and the Fund effective Aubust 1, 1987. (Fact No. 10) Using the modified presumptive method, the Plan found the withdrawal liabilities of Almont and Stevedores as of October 1, 1986, to be \$80,254.00 and \$117,751.00, respectively. (Fact No. 11, 13; Doc. No. 5, p. 41) If the companies owe withdrawal liability, these amounts are stipulated to be accurate. (Fact No. 13) As of September 30, 1986, and October 1, 1986, the Plan as a whole had no unfunded vested benefits. (Fact No. 14; Doc. No. 5, p. 35)

Almont and Stevedores take the position that even if the modified presumptive method for calculating withdrawal liability was still in effect under the Plan, no withdrawal liability exists against them because the Fund at the time had no unfunded vested benefits, and that no such liability is required by ERISA.

In support of this position, the movants rely upon the PBGC's December 30, 1986, Notice of Interpretation (Notice). In that Notice, the PBGC, in light of certain public comments, re-examined the language and legislative history of 29 U.S.C. sec. 1391 and concluded that under the statute a multiemployer plan does not have the right to assess withdrawal liability when there are no unfunded vested benefits at the end of the preceding plan year. In reaching this conclusion, the PBGC specifically rejected its earlier position, enunciated in Opinion Letter 83-19 (August 11, 1983). In its revised interpretation of how the withdrawal liability provisions of ERISA

should be applied, the PBGC stated that its conclusion was applicable to the presumptive, modified presumptive and direct attribution methods.

The movants contend that the PBGC's interpretation of ERISA should be given great weight because it was the agency established by Congress to administer multiemployer pension plans and upon whose report and recommendation the withdrawal liability provisions were enacted.

The movants also assert that the equities of this case weigh heavily in their favor because it would be unfair and illogical to impose liability, especially "for a 'paper debt, when no actual debt exists." (A/S Brief, p. 7) They argue that Congress' intent to maintain solvent plans is satisfied when the Fund as a whole has no unfunded vested benefits.

Needless to say, the Plan takes the position that under the governing law, the movants owed the stipulated amounts even though the Fund as a whole had no unfunded vested benefits at the end of the year preceding their withdrawal. In support of its position, the Plan relies upon the Eighth Circuit's decision in *Ben Hur Construction Co. v. Goodwin*, 784 F. 2d 876 (1986). In addition, the Plan raises several serious questions about the logic of the PBGC's position as stated in its Notice.

Because the PGBC and the Eighth Circuit are the only major governmental authorities cited by the parties as having examined this specific issue, close review of the analysis they used to arrive at their respective conclusions is essential.

As the result of receiving several requests for reconsideration of Opinion Letter 83-19, the PBGC solicited public comments on the proper application of the statutory withdrawal allocation methods in a plan year when there were no unfunded vested benefits. It received a

total of eighteen comments. On the basis of some of these comments, the PBGC re-examined Section 4211(a) of ERISA, 29 U.S.C. Sec. 1391(a), and concluded that its earlier interpretation of the statute had been erroneous.

In its Notice, the PBGC acknowledged that a literal reading of the language of Section 4211(a) would compel the conclusion that an employer could have withdrawal liability even though the plan as a whole had no unfunded vested benefits. Without giving any reason why this straightforward reading should not be accepted, the PBGC stretched to find some ambiguity in the word "allocable" as it was used to describe the unfunded vested benefits for which an employer would be liable. At best, all the PBGC could say was that this term "suggests" the prior existence of unfunded vested benefits to be allocated. Having conjured up an alleged ambiguity, the PBGC then looked to MPPAA's legislative history to support its theory that Congress did not intend or recognize that Section 4211 might be applied to assess withdrawal liability against an employer withdrawing from a fully funded plan.

The PBGC's analysis goes against the "plain meaning rule," a cardinal rule of statutory interpretation. According to the plain meaning rule, if the meaning of the words of a statute are clear, then there is no room for construction. Here, the PBGC admitted that the statute's language lent itself to a straightforward reading. Yet in spite of the availability of a plain meaning for the provision, PBGC looked to certain legislative history to support its contention that Congress meant for liability to result only if the plan had unfunded vested benefits. The inference here is that Congress did not take into account the possibility of employer withdrawal liability despite fully funded benefits.

However, even if Congress did not consider such a possibility, rules of statutory construction do not allow an

agency to read into the law what should be done when the unforeseen situation arises.

Moreover, it can be said that as of March 4, 1985, Congress had been made aware of the situation as the result of a report of the General Accounting Office (GAO). *General Accounting Office, Effects of Liabilities Assessed Employers Withdrawing from Multiemployer Pension Plans*, GAO/HRD-85-16. In that report the GAO said, "[T]hree of the four withdrawal liability allocation methods authorized by MPPAA can result in liability to employers withdrawing from fully funded plans." The GAO suggested, "Congress may wish to consider amending MPPAA to exempt employers in fully funded plans from withdrawal liability." *Id.* at 39, 40. Although Congress has had the issue before it, it has not elected to alter this requirement.

The PBGC contended that its conclusion further buttressed fundamental purposes for imposing employer withdrawal liability, namely to prevent the burden of unfunded benefits from falling on a shrinking contribution base and possible acceleration of the exodus of employers from plans. However, the PBGC's interpretation could have just the opposite effect. Given that the funding status of a plan's benefits could change at any time, due to a variety of internal and external causes, including changing assumptions and financial market conditions, the PBGC's approach would create the incentive for employers to withdraw from plans as soon as they achieve no unfunded vested benefits, with the added result that the contribution base would shrink.

Finally, in its Notice, the PBGC recognized that its new interpretation created an unanswered question, namely, "how the statutory allocation methods are to be applied when a plan that has been fully funded is no longer so." However, no such problem would exist under the PBGC's prior interpretation. This provides another

reason to reaffirm the earlier interpretation of the August 11, 1983, Letter which was issued at a period closer in time to the enactment of the MPPAA in 1980.

The Eighth Circuit in *Ben Hur Construction Company v. Goodwin*, 784 F.2d 876 (1986), interpreted the same statutory language examined by the PBGC and held that the provision did not exempt an employer from withdrawal liability because a plan as a whole had no unfunded vested benefits.[1] *Ben Hur Construction Company*, at 879.

The movants contend that the interpretation of the PBGC deserves considerable deference. However, as the District Court in the *Ben Hur* case said, when denying the plaintiff's motion for relief from judgment due to the change in position of the PBGC, as stated in its Notice,

> While it is true that the PBGC is entitled to great deference in the construction and application of the ERISA statutes, the Court hesitates to interpret that deference as a license to construe statutory language with the force and weight of legal precedent.

Ben Hur Construction Company v. Goodwin, C.A. No. 84-2274-C(4), D. Missouri (Memorandum and Order, filed June 5, 1987).

AWARD

Depending upon the calculation method in effect, the statute allows an employer to be assessed withdrawal liability even when a plan as a whole has no unfunded vested benefits. Because the method of calculating employer withdrawal liability in this matter remained the modified presumptive method, and because ERISA allows

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[1] The facts in the *Ben Hur* case involved liability under the attribution method. However, there is no reason to apply a different analysis for the presumptive and modified presumptive methods. The PBGC reached a similar conclusion in its December 30, 1986, Notice.

the imposition of liability even when a plan is fully funded, Almont and Stevedores are responsible for the stipulated liability amounts.

In accordance with Section 38 of the Multiemployer Plan Arbitration Rules for Withdrawal Liability Disputes costs and fees of the Arbitrator and the American Arbitration Association are to be shared equally by the parties.

/s/ William P. Hobgood
WILLIAM P. HOBGOOD
Arbitrator

Washington, D.C.
July 3, 1988

Excerpt from Federal Register, Vol. 51, No. 250
Wednesday, December 31, 1986

Multiemployer Pension Plans; Withdrawal Liability in Plans Without Unfunded Vested Benefits

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of interpretation.

SUMMARY: On September 6, 1985, the Pension Benefit Guaranty Corporation ("PBGC") published (at 50 FR 36504) a notice soliciting public comment on its reconsideration of the position taken in PGBC Opinion Letter 83-19 that an employer withdrawing from a multiemployer pension plan may incur withdrawal liability to the plan under section 4201 of the Employee Retirement Income Security Act of 1974, as amended, even though the plan has no unfunded vested benefits at the end of the preceding plan year. This notice advises employers, multiemployer plan sponsors, and other interested persons that after reconsidering its provious opinion, the PBGC has concluded that a plan does not have a right to assess withdrawal liability under such circumstances.

FOR FURTHER INFORMATION CONTACT: Deborah C. Murphy, Attorney, Corporate Policy and Regulations Department (35100), Pension Benefit Guaranty Corporation, 2020 K Street, NW., Washington, DC 20006; 202-778-8850 (202-778-8859 for TTY and TDD). (There are not toll-free numbers.)

SUPPLEMENTARY INFORMATION:

Background

Under section 4201 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), an employer that withdraws from a multiemployer pension plan covered under Title IV of ERISA may be required

to pay the plan withdrawal liability, which is the employer's allocable share of the plan's unfunded vested benefits, as determined under section 4211 of ERISA, modified by various other provisions in sections 4201-4225. Section 4211 establishes four methods of computing the amount of unfunded vested benefits allocable to a withdrawing employer: the presumptive method, described in section 4211(b); the modified presumptive method, described in section 4211(c)(2); the rolling-5 method, described in section 4211(c)(3); and the direct attribution methods, described in section 4211(c)(4).

Under each of these methods, except for the rolling-5 method, a withdrawing employer's withdrawal liability is computed by adding up its share of various "pools" of charges and credits, representing unfunded vested benefits and changes in unfunded vested benefits (and, in the case of the direct attribution methods, plan assets). Because a particular employer will normally be charged or credited with differing proportions of each pool, the sum of its charges and credits may be greater than zero, even when the plan as a whole had no unfunded vested benefits as of the end of the plan year preceding the withdrawal.

In Opinion Letter 83-19 (August 11, 1983), the Pension Benefit Guaranty Corporation ("PBGC") took the position that, under the presumptive method described in section 4211(b) of ERISA, a withdrawing employer might incur withdrawal liability even though the plan had no unfunded vested benefits as of the end of the plan year preceding the date of withdrawal. Although the letter did not discuss other allocation methods, the same reasoning would apply to the modified presumptive and direct attribution methods. After receiving several requests for reconsideration of Opinion Letter 83-19, the PBGC published a notice (50 FR 36504 (September 6, 1985)) soliciting public comments on the proper application of the statutory allocation methods in a plan year

when (as of the end of the preceding plan year) a plan has no unfunded vested benefits and in subsequent plan years. In particular, the PBGC requested responses to three questions:

1. Does section 4211 mandate or prohibit assessment of withdrawal liability against an employer that withdraws from a multiemployer plan with no unfunded vested benefits?

2. Does the answer to question 1 depend on the allocation method used?

3. If in a subsequent year a plan's unfunded vested benefits exceed zero, how should withdrawal liability for later withdrawals be calculated?

The PBGC received eighteen comments in response to the notice.

One commenter took the position that section 4211 mandates the assessment of withdrawal liability under all allocation methods without regard to whether a plan has unfunded vested benefits. That commenter pointed out that section 4219(c)(8) of ERISA deals specifically with the extinguishment of withdrawal liabiilty based on a plan's funding status and sets a higher standard than full funding of vested benefits, namely full funding of all plan obligations. The commenter also argued that to prohibit the assessment of withdrawal liability under the direct attribution method by plans with no unfunded vested benefits would mean that some employers would be subsidizing the benefits of other employers' employees.

Most of the commenters stated either that ERISA prohibits the assessment of withdrawal liability where there are no unfunded vested benefits or that the statute is unclear on this point. Some of those who considered the statute unclear on its face contended that, in view of the purposes of ERISA, plans should not assess withdrawal

liability when they have no unfunded vested benefits. Commenters opposing the position taken in Opinion Letter 83-19 pointed out that it is illogical to allocate a share of unfunded vested benefits to an employer, no matter what the statutory formulas provide, if there are no unfunded vested benefits to allocate. They also noted that the *de minimis* reduction from withdrawal liability under ERISA section 4209 disappears when vested benefits become fully funded and concluded that this evidenced a Congressional expectation that plans with no unfunded vested benefits would not assess withdrawal liability. One commenter pointed out that the application of the presumptive method in the manner set forth in Opinion Letter 83-19 can result in the assessment of withdrawal liability even for employers who join a plan after it has become fully funded for vested benefits and have never contributed to the plan when it had unfunded vested benefits.

Only one commenter stated that section 4211 distinguishes between allocation methods with respect to whether withdrawal liability may be assessed when a plan has no unfunded vested benefits. That commenter took the position that the unfunded vested benefits referred to under the direct attribution method are those related to each individual employer, whereas other methods refer to the unfunded vested benefits of the plan as a whole. Thus the commenter concluded that under the direct attribution method—but not the other methods—the allocation of liability to an employer is mandated if unfunded vested benefits are attributable to that employer under the formula prescribed in section 4211, whether or not the plan as a whole has unfunded vested benefits.

New Interpretation

After reviewing the comments submitted in response to the notice and re-examining the statute in the light of those comments, the PBGC is not persuaded that it erred

in stating in Opinion Letter 83-19 that ERISA requires the assessment of withdrawal liability by a plan that has no unfunded vested benefits at the end of the preceding plan year.

The PBGC believes that the references to an allocation of unfunded vested benefits to an employer in sections 4201(b) and 4211 of ERISA support the inference that no allocations are to be made when no unfunded vested benefits exist. Furthermore, "unfunded vested benefits" is defined in ERISA section 4213(c), and that definition refers to the status of a plan as a whole, not to an individual employer's status. Thus no basis appears for the distinction drawn by one of the commenters, and discussed above, between the direct attribution method and other methods.

The arguments advanced in favor of the view set forth in Opinion Letter 83-19 have been reviewed by the PBGC and have been found to be unpersuasive.

The principal basis for that opinion letter was that the result seemed to be compelled by a literal reading of the statutory language. Section 4201(b)(1) of ERISA states:

> The withdrawal liability of an employer to a plan is the amount determined under section 4211 to be the allocable amount of unfunded vested benefits. . . .

Section 4211(a) in turn provides that:

> The amount of the unfunded vested benefits allocable to an employer that withdraws from a plan shall be determined in accordance with subsection (b), (c), or (d) of this section.

For the reasons discussed above, the use of certain of these allocation formulas may produce a positive "amount of unfunded vested benefits allocable to an employer" despite the fact that the plan as a whole has no unfunded vested benefits.

This apparently straightforward reading does not, however, survive closer scrutiny. The use of the term "allocable" at least suggests the prior existence of unfunded vested benefits to be allocated. Further, the discussion of withdrawal liability in the legislative history of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), which added section 4201 *et seq.* to ERISA, strongly reinforces this suggestion. For example, Senator Javits, one of the Senate sponsors of MPPAA, stated:

> Under the bill, an employer who withdraws from a multiemployer plan would be liable to the plan for *a proportionate share of the unamortized amount of the plan's unfunded vested benefits.* In the absence of effective withdrawal liability, an employer could withdraw from a plan leaving unfunded benefit obligations for his employees which must be paid by the remaining employers in the plan. If the plan, or related industry in which it is located, is experiencing or in the foreseeable future will experience financial difficulty, the absence of effective withdrawal liability would encourage a "last man out" mentality, with employers withdrawing from plans to avoid possible plan termination liability.

(126 Cong. Rec. 20,178 (1980) (emphasis supplied).) If a plan has no unfunded vested benefits, each employer's "proportionate share" is necessarily zero, and withdrawals do not entail the evils cited by Senator Javits.

Moreover, the legislative record contains no indication that Congress intended or recognized that section 4211 might be applied to assess withdrawal liability against an employer withdrawing from a fully funded plan. Indeed, as one commenter pointed out, the manner in which the *de minimis* rule (ERISA section 4209) operates implies that Congress did not anticipate that withdrawal liability could exist when a plan had no unfunded vested benefits.

Therefore, the PBGC finds that while section 4211 is ambiguous as to whether an employer that withdraws from a plan that has no unfunded vested benefits as of the end of the preceding plan year may incur withdrawal liability, reference to the legislative history and other provisions of Title IV clears up this ambiguity and compels the conclusion that no withdrawal liability is to be assessed in such as case.

This conclusion is buttressed when one examines the underlying rationale for imposing withdrawal liability. The fundamental purpose of withdrawal liability is to prevent the burden of unfunded benefits from falling on a shrinking contribution base and possibly accelerating the exodus of employers from the plan. In situations where this purposes is not served, the reason for withdrawal liability disappears.

As previously noted, one commenter argued that ERISA section 4219(c)(8) precludes relief from withdrawal liability when a plan is fully funded for vested benefits but not for "all obligations of the plan." The PBGC finds this argument misdirected because the PBGC takes the view that the "obligations of the plan" referred to in section 4219(c)(8) are in fact the plan's vested benefits. This interpretation is consistent with section 4041A(c)(2) of ERISA, which authorizes a terminated plan to close out if it is fully funded for vested benefits.

The PBGC also disagrees with the contention that barring fully funded plans from assessing withdrawal liability is tantamount to the "subsidization" by continuing employers of benefits attributable to a withdrawn employer's employees. Multiemployer plans, by their nature do not attempt to equate a particular employer's contributions to the benefits earned by a particular group of workers. In particular, the amount of unfunded vested benefits allocated to an employer under section 4211 of ERISA may bear little relationship to its own employee's vested benefits. This it true even under the direct

attribution method. Although one element of an employer's liability under that method is the vested benefits attributable to service in its employ, the allocation of plan assets and unattributable benefits destroys any precise link between the calculated liability and the employment and contribution history of the employer.

The fact that an employer has a positive section 4211 balance under a particular funding method does not imply that benefits attributable to its employees have not been fully funded by its own contributions, nor does the absence of a section 4211 balance imply the opposite. To the extent that the statutory allocation methods cause some employers to "subsidize" others, this would occur regardless of whether fully funded plans could assess withdrawal liability and would not be materially reduced by requiring or permitting them to do so.

The PBGC is aware that the U.S. Court of Appeals for the Eighth Circuit, in *Ben Hur Construction Co. v. Goodwin*, 784 F.2d 876 (8th Cir., 1986), took a position inconsistent with that set forth in this notice. For the reasons given above, the PBGC believes that the court's decision was erroneous. The PBGC also notes that the court's rationale would apply only to plans using the direct attribution method.

Accordingly, it is the PBGC's opinion that ERISA does not permit the assessment of withdrawal liability under any statutory allocation method against employers that withdraw from a plan when, as of the end of the preceding plan year, the plan has no unfunded vested benefits.

Finally the PBGC recognizes that the interpretation set forth above creates questions as to how the statutory allocation methods are to be applied when a plan that has been fully funded is no longer so. The PBGC intends to issue a notice of proposed rulemaking dealing with these questions in the near future.

Issued in Washington, D.C. this 23rd day of December 1986.

Kathleen P. Utgoff,

Executive Director, Pension Benefit Guaranty Corporation.

[FR Doc. 86-29310 Filed 12-30-86; 8:45 am]

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

No. 88-1543

BERKSHIRE HATHAWAY, INC.,
Plaintiff, Appellant,

v.

TEXTILE WORKERS PENSION FUND,
Defendant, Appellee.

Heard Dec. 7, 1988

Decided May 9, 1989

William L. Patton with whom James B. Levy and Ropes & Gray, Boston, Mass., were on brief, for plaintiff, appellant.

Ronald E. Richman with whom Mark E. Brossman, Mary Ellen Koscs-Fleming, Chadbourne & Parke, New York City, N.Y., William F. Joy, Jr., Laurence J. Donoghue and Morgan, Brown & Joy, Boston, Mass., were on brief, for defendant, appellee.

Before COFFIN, BOWNES and SELYA, Circuit Judges.

COFFIN, Circuit Judge.

This case presents the issue of whether withdrawal liability may be assessed under the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381 *et seq.*

(MPPAA or "the Act"), against an employer who withdraws from a fully funded plan. The district court held that such employers may incur withdrawal liability. We believe the district court failed to give adequate deference to the implementing agency's interpretation, which we view as reasonable, supported by the statutory language, and consistent with the Act's purpose as revealed by its legislative history. Accordingly, we vacate.

I. BACKGROUND

This is an appeal from summary judgment for the Textile Workers Pension Fund (the Fund) against Berkshire Hathaway, Inc. The Fund sponsors a multiemployer defined benefit pension plan under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001, *et seq.* *See* 29 U.S.C. §§ 1002(35), 1002(37), 1301(a)(3). Berkshire began contributing to the plan in 1970 pursuant to collective bargaining agreements with the Textile Workers Union and its successor, the Amalgamated Clothing and Textile Workers Union. Berkshire withdrew from the plan when it closed down textile operations at plants that employed participating workers. Berkshire challenged in the district court the Fund trustees' allocation of liability against Berkshire under the plan's withdrawal liability provisions. These provisions are mandated by statute, and regulated by the Pension Benefit Guaranty Corporation (PBGC).

Berkshire argues that section 4211 of ERISA, 29 U.S.C. § 1391, properly construed, does not authorize withdawal liability where a pension plan's vested benefits are fully funded. The district court, without opinion, rejected Berkshire's position by granting the Fund's motion for summary judgment, based on the analysis in *Ben Hur Construction Co. v. A.S. Goodwin*, 784 F.2d 876 (8th Cir.1986). Subsequent to the Eighth Circuit's consideration of the issue, the PBGC issued a "Notice of Interpretation," concluding that under the statute withdrawal lia-

bility should not attach where a plan's vested benefits are fully funded.[1]

The Supreme Court has recently reviewed the legislative history of the MPPAA in some detail. We quote liberally from its opinion in the appendix to familiarize the reader with the events leading to the passage of the MPPAA. *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 720-23, 104 S.Ct. 2709, 2713-15, 81 L.Ed.2d 601 (1984). The progress of the legislation makes clear that the MPPAA was designed to address two related problems. Before the MPPAA, employers in mutiemployer pension plans had an incentive to withdraw from financially troubled plans in order to avoid financial liability should the plan have to be terminated. Congress was aware that many multiemployer plans were associated with financially troubled industries. Congress was concerned that this perverse incentive would hasten the demise of many multiemployer plans, and overburden the resources of the PBGC, whose insurance of vested benefits of single-employer plans it sought to extend to multiemployer plans.

The PBGC's recommendations were explained by its Executive Director:

> To deal with this problem, our report considers an approach under which an employer withdrawing from

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[1] The Notice reads, in part:

> The fundamental purpose of withdrawal liability is to prevent the burden of unfunded benefits from falling on a shrinking contribution base and possibly accelerating the exodus of employers from the plan. In situations where this purpose is not served, the reason for withdrawal liability disappears.
>
> * * * *
>
> ERISA does not permit the assessment of withdrawal liability under any statutory allocation method against employers that withdraw from a plan when, as of the end of the preceding plan year, the plan has no unfunded vested benefits.

51 Fed.Reg. 47,344 (1986).

> a multiemployer plan would be required to complete funding its fair share *of the plan's unfunded vested liabilities.* In other words, the plan would have a claim against the employer for the inherited liabilities which would otherwise fall upon the remaining employers as a result of the withdrawal . . . .
>
> We think that such withdrawal liability would, first of all, discourage voluntary withdrawals and curtail the current incentives to flee the plan.

Pension Plan Termination Insurance Issues: Hearings before the Subcommittee on Oversight of the House Committee on Way and Means, 95th Cong., 2nd Sess., 23 (1978) (statement of Matthew M. Lind) (emphasis added).

II. ANALYSIS

Berkshire argues that the district court erred in relying on *Ben Hur*, and in not deferring to PBGC's subsequent Notice of Interpretation. Berkshire further argues that *Ben Hur* misread the statute and its legislative history in determining that an employer may incur withdrawal liability where a plan's vested benefits are fully funded. The Fund disputes this, and argues that the "plain language" of the MPPAA supports withdrawal liability in such circumstances. Indeed, because the matter is so clear, the Fund argues, the PBGC's interpretation is entitled to no deference whatsoever. Permitting withdrawal liability for fully funded plans will further the Act's purpose of discouraging withdrawal and encourage additional employers to particpiate, it argues.[2]

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[2] This last suggestion is somewhat puzzling. Employer participation in multiemployer pension plans is a matter of bargaining between employers and unions. Likewise, the level of an employer's contribution is a matter of bargaining between the employer and the union. These plans are governed by trustees drawn equally from employers and unions. Benefits to covered employees, however, are set independently by plan trustees—drawn equally from employers and unions—and not by the employers or unions them-

We are persuaded that deference to the PBGC's interpetation is appropriate in this case. The PBGC, a product of the original ERISA legislation, has extensive experience in the area, and has had a central role in the implementation of ERISA from the outset. *See Belland v. Pension Benefit Guaranty Corp.*, 726 F.2d 839 (D.C.Cir. 1984) (PBGC interpretation of ERISA entitled to "great deference"). The MPPAA was founded on a specific study and accompanying recommendations by the PBGC, as set forth in *R.A. Gray* (see appendix). It is evident that the withdrawal liability provisions of the MPPAA were specifically directed toward preserving the resources of the PBGC in anticipation of extending its insurance coverage to multiemployer plans. The PBGC, after a fifteen-month notice and comment period, indicating that this concern is simply not implicated where a plan's vested benefits are fully funded. Of course the *Ben Hur* court did not have the benefit of the PBGC's Notice of Interpretation, and instead looked to a General Accounting Office report consistent with the PBGC's earlier position on the issue. 784 F.2d at 879 & n. 4.[3]

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selves. Thus, multiemployer pension plans are structured as "pooled" funds, such that some employers, in effect, "subsidize" the employees of other employers.

In this case, Berkshire's contributions did not cover the level of benefits to be drawn by its employees. To the extent its employees received benefits in excess of the cost to the company, Berkshire would appear to profit from the pooled nature of the multiemployer plan; it had no apparent incentive to withdraw. Given that Berkshire only agreed to a level of contribution *below* that necessary to independently fund full benefits for its employees, it can be inferred that Berkshire would have further resisted participation in the Plan had it been required to provide the higher level of funding. Reading the MPPAA to permit withdrawal liability where an employer's contributions are less than its employees' benefits would appear to *discourage* participation by additional employers.

[3] The GAO suggested that Congress amend the statute to exempt employers from withdrawal liability where a plan is fully funded, concluding: "Such an exemption would be consistent with with-

Perhaps most importantly, PBGC's interpretation is consistent with the statutory language, and Congress expressly delegated substantial regulatory authority to PBGC relating to withdrawal liability. Section 4201 of ERISA, 29 U.S.C. § 1381, provides that an employer's withdrawal liability is "the amount determined under section 4211 of this title [29 U.S.C. § 1391] to be the allocable amount of unfunded vested benefits." Section 4211 in turn authorizes various alternative schemes for determining withdrawal liability. This section permits plan trustees to choose one of the alternatives in advance, *subject to approval by the PBGC.*

The Fund trustees had selected a variation of the "direct allocation method." Under this method, the trustees assessed Berkshire withdrawal liability for:

> (i) the plan's unfunded vested benefits which are attributable to participants' service with the employer . . . .

29 U.S.C. § 1391(c)(4)(A). As defined by the statute:

> The plan's unfunded vested benefits which are attributable to participants' service with the employer is the amount equal to the value of nonforfeitable benefits under the plan which are attributable to participants' service with such employer (determined under plan rules not inconsistent with regulations of the [PBGC]) decreased by the share of plan assets . . . which is allocated to the employer . . . .

29 U.S.C. § 1391(c)(4)(B).

The Fund argues that this language equates "the plan's unfunded vested benefits" with the amount by which an employer's negotiated contributions underfund the de-

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drawal liability based on a share of the plan's unfunded vested benefits and should have little effect on the plan or its contributing employers." General Accounting Office, Effects of Liabilities Assessed Employers Withdrawing from Multiemployer Pension Plans 40, GAO/HRD-85-16 (Mar. 4, 1985).

fined benefits of that employer's participating workers. But an equally plausible, and perhaps more intuitive, reading is that § 1391(c)(4)(B) presumes that *the plan* has unfunded vested benefits—*i.e.*, in the aggregate—before one reaches the allocation of that deficit on an employer-by-employer basis. This interpretation has been adopted by the PBGC:

> The use of the term "allocable" [29 U.S.C. §§ 1381, 1391] at least suggests the prior existence of unfunded vested benefits to be allocated. Further, the discussion of withdrawal liability in the legislative history of the [MPPAA] strongly reinforces this suggestion. For example, Senator Javits, one of the Senate sponsor [sic] of MPPAA, stated:
>
> "Under the bill, an employer who withdraws from a multiemployer plan would be liable to the plan for a *proportionate share of the unamortized amount of the plan's unfunded vested benefits.*"

Notice of Interpretation, 51 Fed.Reg. 47,343 (1986) (citing 126 Cong.Rec. 20,178 (1980)) (emphasis added).[4]

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[4] It is true, as the Fund argues, that the Notice of Interpretation contradicts the PBGC's earlier view. *See* Opinion Letter 83-19, 50 Fed.Reg. 36,504 (1985). Inconsistency in agency interpretation of a statute is grounds for according less deference to the agency's interpretation. *See Wilcox v. Ives*, 864 F.2d 915, 924-25 (1st Cir. 1988). However this principle does not mandate a wholesale abandoning of deference whenever an agency changes its view. The PBGC's Notice of Interpretation followed a fifteen-month notice and comment period soliciting comments on Opinion Letter 83-19. As the subsequent Notice explained:

> The principal basis for [Opinion Letter 83-19] was that the result seemed to be compelled by a literal reading of the statutory language . . . . This apparently straighforward [sic] reading does not, however, survive closer scrutiny.

51 Fed.Reg. 47,343 (1986). The Notice goes on to ground the new position on the structure, policy goals, and legislative history of the MPPAA. The agency's explanation for its change of position

This reading appears consistent with the two primary purposes behind the 1980 amendments: to protect the PBGC's limited resources, and to remove the incentive for employer withdrawal from shaky multiemployer pension plans. *See Keith Fulton & Sons v. New England Teamsters & Trucking Indus. Pension Fund*, 762 F.2d 1137, 1145 (1st Cir.1985) (en banc). Where a plan is fully funded, the risk that the PBGC's resources will be called upon to fund those benefits is low. Likewise, when a plan is fully funded, employers have little incentive to withdraw. If the plan is not fully funded, withdrawal liability will attach, thus discouraging withdrawals.

III. CONCLUSION

We believe that the relevant statutory language supports the position that Congress did not intend to impose withdrawal liability on employers in a fully funded plan. But even viewed in the light most favorable to the Fund, the statute is at best ambiguous. The PBGC, authorized by Congress to implement the statute, has promulgated a reasonable interpretation, one which is consistent with the statute's purpose and overall structure. If we consider the precise statutory provisions at issue as ambiguous, then we believe the circumstances call for deference to the PBGC's interpretation. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *cf. Wilcox v. Ives*, 864 F.2d 915, 924-27 (1st Cir.1988) (discussing this circuit's approach to the issue of agency deference).

The judgment of the district court is vacated, and the case is remanded for further proceedings consistent with this opinion.

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strikes us as credible. The agency's current interpretation should not be discounted in this case because it is the result of a more considered examination of the issue.

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No. 90-955

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALMONT SHIPPING COMPANY, INC.,
A NORTH CAROLINA CORPORATION,
Petitioner,

v.

PETER BROWNE RUFFIN; WARD KING; JOHN E. DYER; WILLIE SLOAN; WILLIAM PINER; HENRY ARRON ROSE, IN THEIR CAPACITIES AS TRUSTEES FOR THE EMPLOYERS-ILA PENSION, WELFARE & VACATION FUND FOR THE NORTH CAROLINA PORTS AREA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION

MICHAEL MURCHISON
Counsel of Record
16 N. Fifth Avenue
Wilmington, NC 28401
(919) 763-2426
Attorney for Respondents

QUESTION PRESENTED

The question presented is whether under the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §1381 *et seq.*, a pension plan using the modified presumptive method of calculating withdrawal liability, which had unfunded vested benefits at the end of the last plan year before September 26, 1980 and which had no unfunded vested benefits (i.e., was fully funded) at the end of the plan year preceding an employer's withdrawal, may assess withdrawal liability against such employer.

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BRIEF OF RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

In 1980, Congress enacted the Multiemployer Pension Plan Amendments of 1980, P. L. 96-364, 96 Stat. 1208, 29 U.S.C. §1381 *et seq.*, (the "Act"). The Act imposes withdrawal liability, in certain circumstances, on employers who withdraw from multiemployer pension plans. Section 1391 of the Act outlines five alternative methods of

computing withdrawal liability. These methods have commonly been called the presumptive method, 29 U.S.C. §1391(b), the modified presumptive method, 29 U.S.C. §1391(c)(2), the rolling-five method, 29 U.S.C. §1391(c)(3), the direct allocation or direct attribution method, 29 U.S.C. §1391(c)(4) and the special PBGC method, 29 U.S.C. §1391(c)(5). These methods yield different computations of withdrawal liability.

The Employers-I.L.A. Pension Fund for the North Carolina Ports Area duly adopted the modified presumptive method for assessing withdrawal liability. This method, although complex in its particulars, basically provides that withdrawal liability for employers who were participants in the plan on September 26, 1980 is the sum of two separate figures: (a) the employer's proportionate share of the plan's unfunded vested benefits prior to September 26, 1980, reduced in level annual installments over a fifteen year period, and (b) the employer's share of the plan's unfunded vested benefits at the end of the year preceding the employer's withdrawal. Under this formula, employers who were participants in the plan in 1980 shoulder a fixed liability for the pre-1980 unfunded vested benefits, which liability is reduced only through the 15 year amortization.[1]

Petitioners Almont and Stevedores were employer participants in the Fund on September 26, 1980. When they withdrew from the Fund in 1987 the Fund computed their withdrawal liability under the modified presumptive method. In doing so, the Fund added Almont/Stevedores' share of the plan's pre-1980 unfunded vested benefits to

[1] The legislative history reveals that Congress's purpose in freezing the liability for pre-1980 unfunded vested benefits was to impose upon existing employers the responsibility for unfunded liabilities at the time the Act was passed, so as not to saddle newly entering employers with such liabilities and thereby discourage them from joining the plan. H.R. Rep. No. 96-869, 96th Cong., 2nd Sess., pt. 1 (Education and Labor Committee Report) at 77 (1980) reprinted in 1980 U.S. Code Cong. and Admin. News 2918, 2945.

their share of the plan's post-1980 unfunded vested benefits. Because the plan had assets in excess of vested benefits in the year preceding withdrawal, the post-1980 figure partially offset Almont/Stevedores' share of the pre-1980 unfunded vested benefits. The net result of the plan's calculations was a positive withdrawal liability, notwithstanding the plan's fully funded status as of the year-end preceding withdrawal.[2]

Throughout the course of this litigation, Almont and Stevedores have not challenged the Fund's calculations of withdrawal liability under the modified presumptive method. Rather, they argue that the modified presumptive method should be disregarded when the plan has no unfunded vested benefits in the year preceding withdrawal. In large part they rely on a 1986 "notice of interpretation" by the Pension Benefit Guaranty Corporation ("PBGC") which reversed an earlier 1983 opinion from the same agency. (See, Notice of Interpretation, 51 Federal Register 47,342 (1986), reprinted in petitioner's Appendix at 48(a) through 56(a), and Opinion Letter 83-19, (August 11, 1983). The PBGC's 1986 notice acknowledged that its earlier 1983 opinion "seemed to be compelled by a literal reading of the statutory language." The 1986 notice nevertheless rejected this "apparently straightforward reading" of the statute and concluded that no assessment of withdrawal liability can be made when the plan has no unfunded vested benefits as of the end of the preceding plan year. (Notice of Interpretation, petitioner's Appendix 52a-53a) The Fourth Circuit rejected this attempt to rewrite plain congressional language and held that the absence of unfunded vested benefits in the year

[2] Almont's amortized share of pre-1980 unfunded benefits was $87,792. Almont's share of post-1980 overfunding was $7,538. Stevedores' amortized share of the pre-1980 unfunded vested benefits was $217,918. Stevedores' share of the post-1980 overfunding was $100,166. By offsetting the post-1980 overfunding against the pre-1980 underfunding, the Fund computed withdrawal liability of $80,254 for Almont and $117,751 for Stevedores.

preceding withdrawal does not immunize Almont/Stevedores from liability which application of the modified presumptive method imposes on them.

REASONS FOR DENYING THE WRIT

I. The Lack of Conflict in the Circuits.

There is no conflict in the circuits which requires the attention of this Court. The decision of the First Circuit in *Berkshire Hathaway, Inc. v. Textile Workers Pension Fund*, 874 F.2d 53 (CA 1 1989), involved calculation of withdrawal liability under the direct allocation method, a method which is different from the modified presumptive method involved here and is based on different statutory language which is arguably more susceptible of the interpretation advanced by petitioners in this case. The Fourth Circuit addressed this conflict and concluded that the *Berkshire Hathaway* decision was not necessarily at odds with its own. The Fourth Circuit stated:

> "In contrast to the modified presumptive method, the direct allocation method used in *Berkshire Hathaway* does not so explicitly require inclusion of UVB [unfunded vested benefits] amounts for a year other than the year immediately preceding withdrawal. To the contrary, the statutory description of the method used by the plan in *Berkshire Hathaway* contains explicit directives to base computations upon the year preceding withdrawal . . . .
>
> The plan in *Berkshire Hathaway* argued from congressional silence that it would be wrong to conclude that the quoted provision assumes the existence of some plan unfunded vested benefits before computing each employer's share. Thus, unlike the Funds before us, who simply ask that we apply pellucidly clear statutory directives to

> include UVBs [unfunded vested benefits] as of 1980 in the withdrawal liability calculation, the plan in *Berkshire Hathaway* asked the court to inject a certain meaning into language that was, at best, from the plan's perspective, ambiguous".
> *Wise v. Ruffin*, 914 F.2d 570, 581 (CA 4 1990), Petitioner's Appendix at 24a-25a.

If there is a conflict in the circuit courts, it is between the Eighth Circuit's decision in *Ben Hur Construction Co. v. A.S. Goodwin*, 784 F.2d 876 (CA 8 1986), and the *Berkshire Hathaway* decision, both of which involved the direct attribution or direct allocation method. A decision in this case, involving the modified presumptive method, will not necessarily resolve any such conflict.

II. The Issue Is Not of General Importance.

There is no evidence of a general interest in the issue in this case. For instance, when the PBGC solicited public comment on the question, it received only eighteen comments before announcing its Notice of Interpretation in December, 1986 (Petitioner's Appendix 48a and 50a). Research for the period 1980 through 1990 reveals only three United States district court cases dealing with the question. They are the three cases appealed in *Ben Hur*, *Berkshire Hathaway* and this case.

Petitioner points out on page 8 of the petition that in 1989 there were approximately 2,300 multiemployer pension plans and that a majority of all plans had been fully funded during the years 1980 through 1989. If only three of 2,300 plans have litigated the question in this case, the issue cannot be said to be "of general importance".

Significantly, the issue in this case is rapidly becoming moot. In 1995, all plans using the modified presumptive method will have fully amortized their pre-1980 unfunded vested benefits. As of that date, withdrawal liability will be calculated solely upon the basis of unfunded vested

benefits in the year preceding withdrawal and will not include any component for pre-1980 unfunded benefits. After 1995, if a plan is fully funded in the year preceding withdrawal there will be no withdrawal liability. This is the result petitioner argues for here. There is little to be gained in addressing an issue of statutory construction which will become irrelevant in less than five years.

One possible reason the issue in this case has not received much airing in the courts is that plans are free to change the method by which withdrawal liability is calculated. One such method, the "rolling five method", bases withdrawal liability exclusively on the plan's unfunded vested benefits in the year preceding withdrawal. Under the rolling five method, if there are no unfunded benefits in the year preceding withdrawal there is no withdrawal liability. Plans which desire to eliminate withdrawal liability when the plan is fully funded may always elect to change to the rolling five method. This is a decision which plan trustees, who are armed with knowledge of the plan's financial health and who have a fiduciary duty to maintain the financial integrity of the plan, are in the best position to make.[3]

III. The Decision of the Court Below Does Not Conflict with Decisions of this Court.

Petitioner contends that the Fourth Circuit decision below is in conflict with the Court's decision in *Pension Benefit Guaranty Corporation v. R. A. Gray & Company*, 467 U.S. 717 (1984). No such conflict exists. The issue in *Pension Benefit Guaranty Corporation v. Gray* was whether

[3] Almont/Stevedores recognized that the rolling-five method would eliminate their liability and they urged the arbitrator, unsuccessfully, to find that the Fund trustees had changed to that method. See, In the Matter of Arbitration between Almont Shipping Co., Inc. and Stevedores, Inc. and Employers-ILA North Carolina Ports Area Hourly Paid Employees Pension Plan, decided July 3, 1988, reprinted in petitioner's Appendix at 33a-47a.

retroactive application of the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 violated due process. That case did not address the issue of the proper application of the various formulas for computing withdrawal liability nor the question of whether those formulas could be disregarded when the plan has no unfunded benefits in the year preceding withdrawal. The passage from the *Gray* opinion quoted by petitioner simply constitutes a shorthand description of withdrawal liability and the meaning of the words "unfunded vested benefits." Clearly, the Court in *Gray* was not attempting to condense the seven pages of 29 U.S.C. §1391 into a single sentence or to obliterate, without discussion, statutory methods such as the modified presumptive method, in which the employer's share of the plan's unfunded benefits is measured at two separate dates.

IV. Other Considerations.

Petitioner argues that the Fourth Circuit decision is contrary to Congressional intent. The facts show otherwise. The General Accounting Office, in a 1985 report, drew Congress's attention to the fact that the statutory formulas can produce withdrawal liability even though a plan is fully funded, and the GAO suggested an amendment to eliminate such liability. (General Accounting Office, Effects of Liabilities Assessed Employers Withdrawing from Multiemployer Pension Plans, GAO/HRD-85-16, March 14, 1985). Congress has amended the pension laws several times since 1985 but has not made the suggested amendment.

The Pension Benefit Guaranty Corporation recognized in its 1986 Notice of Interpretation that its interpretation created questions as to how the statutory methods for calculating withdrawal liability should be applied when a plan that is fully funded is no longer so. (Petitioner's Appendix p. 55a) The PBGC promised to issue a notice of

proposed rulemaking to deal with these important questions. No such rulemaking has been forthcoming. Until the PBGC engages in such rulemaking, review of this issue by the Court would be inappropriate because the Court would not have the benefit of the agency's thinking concerning some of the more incongruous ramifications of its 1986 interpretation.

CONCLUSION

Contrary to petitioner's contentions, there is no clear conflict in the circuits and no conflict with any Supreme Court decision. The issue posed by this case has not generated much interest and is short lived in duration. Far from defying logic and Congressional intent, the Fourth Circuit's opinion adopts the plain meaning of the Act and effectuates its purposes.

For the foregoing reasons, the petition for writ of certiorari filed by Almont should be denied.

Respectfully submitted,

MICHAEL MURCHISON
Counsel of Record
16 North Fifth Avenue
Wilmington, NC 28401
(919) 763-2426
Attorney for Respondents

APPENDIX

APPENDIX

MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980

P.L. 96-364, 94 Stat. 1208, 29 U.S.C. §1381 et seq.

29 U S.C. §1381. Withdrawal liability established; criteria and definitions.

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

(b) For purposes of subsection (a) of this section—

(1) The withdrawal liability of an employer to a plan is the amount determined under section 1391 of this title to be the allocable amount of unfunded vested benefits, adjusted—

(A) first, by any de minimis reduction applicable under section 1389 of this title,

(B) next, in the case of a partial withdrawal, in accordance with section 1386 of this title,

(C) then, to the extent necessary to reflect the limitation on annual payments under section 1399(c)(1)(B) of this title, and

(D) finally, in accordance with section 1405 of this title.

(2) The term "complete withdrawal" means a complete withdrawal described in section 1383 of this title.

(3) The term "partial withdrawal" means a partial withdrawal described in section 1385 of this title.

29 U.S.C. §1391. Methods for computing withdrawal liability.

(a) Determination of amount of unfunded vested benefits allocable to employer withdrawn from plan

The amount of the unfunded vested benefits allocable to an employer that withdraws from a plan shall be determined in accordance with subsection (b), (c), or (d) of this section.

(b) Factors determining computation of amount of unfunded vested benefits allocable to employer withdrawn from plan

(1) Except as provided in subsections (c) and (d) of this section, the amount of unfunded vested benefits allocable to an employer that withdraws is the sum of—

(A) the employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after September 25, 1980, as determined under paragraph (2),

(B) the employer's proportional share, if any, of the unamortized amount of the plan's unfunded vested benefits at the end of the plan year ending before September 26, 1980, as determined under paragraph (3); and

(C) the employer's proportional share of the unamortized amounts of the reallocated unfunded vested benefits (if any) as determined under paragraph (4).

If the sum of the amounts determined with respect to an employer under paragraphs (2), (3), and (4) is negative, the unfunded vested benefits allocable to the employer shall be zero.

(2) **(A)** An employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after September 25, 1980, is the sum of the employer's proportional shares of the unamortized amount of the change in unfunded vested benefits for each plan year in which the employer has an obligation to contribute under the plan ending—

(i) after such date, and

(ii) before the plan year in which the withdrawal of the employer occurs.

(B) The change in a plan's unfunded vested benefits for a plan year is the amount by which—

(i) the unfunded vested benefits at the end of the plan year; exceeds

(ii) the sum of—

(I) the unamortized amount of the unfunded vested benefits for the last plan year ending before September 26, 1980, and

(II) the sum of the unamortized amounts of the change in unfunded vested benefits for each plan year ending after September 25, 1980, and preceding the plan year for which the change is determined.

(C) The unamortized amount of the change in a plan's unfunded vested benefits with respect to a plan year is the change in unfunded vested benefits for the plan year, reduced by 5 percent of such change for each succeeding plan year.

(D) The unamortized amount of the unfunded vested benefits for the last plan year ending before September 26, 1980, is the amount of the unfunded vested benefits as of the end of that plan year reduced by 5 percent of such amount for each succeeding plan year.

(E) An employer's proportional share of the unamortized amount of a change in unfunded vested benefits is the product of—

(i) the unamortized amount of such change (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) a fraction—

(I) the numerator of which is the sum of the contributions required to be made under the plan by the employer for the year in which such change arose and for the 4 preceding plan years, and

(II) the denominator of which is the sum for the plan year in which such change arose and the 4 preceding plan years of all contributions made by employers who had an obligation to contribute under the plan for the plan year in which such change arose reduced by the contributions made in such years by employers who had withdrawn from the plan in the year in which the change arose.

(3) An employer's proportional share of the unamortized amount of the plan's unfunded vested benefits for the last plan year ending before September 26, 1980, is the product of—

(A) such unamortized amount; multiplied by—,

(B) a fraction—

(i) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the most recent 5 plan years ending before September 26, 1980, and

(ii) the denominator of which is the sum of all contributions made for the most recent 5 plan years ending before September 26, 1980, by all employers—

(I) who had an obligation to contribute under the plan for the first plan year ending on or after such date, and

(II) who had not withdrawn from the plan before such date.

(4) (A) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits is the sum of the employer's proportional shares of the unamortized amount of the reallocated unfunded vested benefits for each plan year ending before the plan year in which the employer withdrew from the plan.

(B) Except as otherwise provided in regulations prescribed by the corporation, the reallocated unfunded vested benefits for a plan year is the sum of—

(i) any amount which the plan sponsor determines in that plan year to be uncollectible for reasons arising out of cases or proceedings under Title 11, or similar proceedings.

(ii) any amount which the plan sponsor determines in that plan year will not be assessed as a result of the operation of section 1389, 1399(c)(1)(B), or section 1405 of this title against an employer to whom a notice described in section 1399 of this title has been sent, and

(iii) any amount which the plan sponsor determines to be uncollectible or unassessable in that plan year for other reasons under standards not inconsistent with regulations prescribed by the corporation.

(C) The unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the reallocated unfunded vested benefits for the plan year, reduced by 5 percent of such reallocated unfunded vested benefits for each succeeding plan year.

(D) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the product of—

(i) the unamortized amount of the reallocated unfunded vested benefits (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) the fraction defined in paragraph (2)(E)(ii).

(c) Amendment of multiemployer plan for determination respecting amount of unfunded vested benefits allocable to employer withdrawn from plan; factors determining computation of amount

(1) A multiemployer plan, other than a plan which primarily covers employees in the building and construction industry, may be amended to provide that the amount of unfunded vested benefits allocable to an employer that withdraws from the plan is an amount determined under

paragraph (2), (3), (4), or (5) of this subsection, rather than under subsection (b) or (d) of this section. A plan described in section 1383(b)(1)(B)(i) of this title (relating to the building and construction industry) may be amended, to the extent provided in regulations prescribed by the corporation, to provide that the amount of the unfunded vested benefits allocable to an employer not described in section 1383(b)(1)(A) of this title shall be determined in a manner different from that provided in subsection (b) of this section.

(2) **(A)** The amount of the unfunded vested benefits allocable to any employer under this paragraph is the sum of the amounts determined under subparagraphs (B) and (C).

(B) The amount determined under this subparagraph is the product of—

(i) the plan's unfunded vested benefits as of the end of the last plan year ending before September 26, 1980, reduced as if those obligations were being fully amortized in level annual installments over 15 years beginning with the first plan year ending on or after such date; multiplied by

(ii) a fraction—

(I) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the last 5 plan years ending before September 26, 1980, and

(II) the denominator of which is the sum of all contributions made for the last 5 plan years ending before September 26, 1980, by all employers who had an obligation to contribute under the plan for the first plan year ending after September 25, 1980, and who had not withdrawn from the plan before such date.

(C) The amount determined under this subparagraph is the product of—

(i) an amount equal to—

(I) the plan's unfunded vested benefits as of the end of the plan year preceding the plan year in which the employer withdraws, less

(II) the sum of the value as of such date of all outstanding claims for withdrawal liability which can reasonably be expected to be collected, with respect to employers withdrawing before such plan year, and that portion of the amount determined under subparagraph (B)(i) which is allocable to employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws and who also had an obligation to contribute under the plan for the first plan year ending after September 25, 1980; multiplied by

(ii) a fraction—

(I) the numerator of which is the total amount required to be contributed under the plan by the employer for the last 5 plan years ending before the date on which the employer withdraws, and

(II) the denominator of which is the total amount contributed under the plan by all employers for the last 5 plan years ending before the date on which the employer withdraws, increased by the amount of any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed by an employer who withdrew from the plan under this part during those plan years.

(D) The corporation may by regulation permit adjustments in any denominator under this section, consistent with the purposes of this subchapter, where such adjustment would be appropriate to ease administrative burdens of plan sponsors in calculating such denominators.

(3) The amount of the unfunded vested benefits allocable to an employer under this paragraph is the product of—

(A) the plan's unfunded vested benefits as of the end of the plan year preceding the plan year in which the employer withdraws, less the value as of the end of such year of all outstanding claims for withdrawal liability which can reasonably be expected to be collected from employers withdrawing before such year; multiplied by

(B) a fraction—

(i) the numerator of which is the total amount required to be contributed by the employer under the plan for the last 5 plan years ending before the withdrawal, and

(ii) the denominator of which is the total amount contributed under the plan by all employers for the last 5 plan years ending before the withdrawal, increased by any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed to the plan during those plan years by employers who withdrew from the plan under this section during those plan years.

(4) (A) The amount of the unfunded vested benefits allocable to an employer under this paragraph is equal to the sum of—

(i) the plan's unfunded vested benefits which are attributable to participants' service with the employer (determined as of the end of the plan year preceding the plan year in which the employer withdraws), and

(ii) the employer's proportional share of any unfunded vested benefits which are not attributable to service with the employer or other employers who are obligated to contribute under the plan in the plan year preceding the plan year in which the employer withdraws (determined as of the end of the plan year preceding the plan year in which the employer withdraws).

(B) The plan's unfunded vested benefits which are attributable to participants' service with the employer

is the amount equal to the value of nonforfeitable benefits under the plan which are attributable to participants' service with such employer (determined under plan rules not inconsistent with regulations of the corporation) decreased by the share of plan assets determined under subparagraph (C) which is allocated to the employer as provided under subparagraph (D).

(C) The value of plan assets determined under this subparagraph is the value of plan assets allocated to nonforfeitable benefits which are attributable to service with the employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws, which is determined by multiplying—

(i) the value of the plan assets as of the end of the plan year preceding the plan year in which the employer withdraws, by

(ii) a fraction—

(I) the numerator of which is the value of nonforfeitable benefits which are attributable to service with such employers, and

(II) the denominator of which is the value of all nonforfeitable benefits under the plan as of the end of the plan year

(D) The share of plan assets, determined under subparagraph (C), which is allocated to the employer shall be determined in accordance with one of the following methods which shall be adopted by the plan by amendment:

(i) by multiplying the value of plan assets determined under subparagraph (C) by a fraction—

(I) the numerator of which is the value of the nonforfeitable benefits which are attributable to service with the employer, and

(II) the denominator of which is the value of the nonforfeitable benefits which are attributable to service with all employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws;

(ii) by multiplying the value of plan assets determined under subparagraph (C) by a fraction—

(I) the numerator of which is the sum of all contributions (accumulated with interest) which have been made to the plan by the employer for the plan year preceding the plan year in which the employer withdraws and all preceding plan years; and

(II) the denominator of which is the sum of all contributions (accumulated with interest) which have been made to the plan (for the plan year preceding the plan year in which the employer withdraws and all preceding plan years) by all employers who have an obligation to contribute to the plan for the plan year preceding the plan year in which the employer withdraws; or

(iii) by multiplying the value of plan assets under subparagraph (C) by a fraction—

(I) the numerator of which is the amount determined under clause (ii)(I) of this subparagraph, less the sum of benefit payments (accumulated with interest) made to participants (and their beneficiaries) for the plan years described in such clause (ii)(I) which are attributable to service with the employer; and

(II) the denominator of which is the amount determined under clause (ii)(II) of this subparagraph, reduced by the sum of benefit payments (accumulated with interest) made to participants (and their beneficiaries) for the plan years described in such clause (ii)(II) which are attributable to service with respect to the employers described in such clause (ii)(II).

(E) The amount of the plan's unfunded vested benefits for a plan year preceding the plan year in which

an employer withdraws, which is not attributable to service with employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which such employer withdraws, is equal to—

(i) an amount equal to—

(I) the value of all nonforfeitable benefits under the plan at the end of such plan year, reduced by

(II) the value of nonforfeitable benefits under the plan at the end of such plan year which are attributable to participants' service with employers who have an obligation to contribute under the plan for such plan year; reduced by

(ii) an amount equal to—

(I) the value of the plan assets as of the end of such plan year, reduced by

(II) the value of plan assets as of the end of such plan year as determined under subparagraph (C); reduced by

(iii) the value of all outstanding claims for withdrawal liability which can reasonably be expected to be collected with respect to employers withdrawing before the year preceding the plan year in which the employer withdraws.

(F) The employer's proportional share described in subparagraph (A)(ii) for a plan year is the amount determined under subparagraph (E) for the employer, but not in excess of an amount which bears the same ratio to the sum of the amounts determined under subparagraph (E) for all employers under the plan as the amount determined under subparagraph (C) for the employer bears to the sum of the amounts determined under subparagraph (C) for all employers under the plan.

(G) The corporation may prescribe by regulation other methods which a plan may adopt for allocating assets to determine the amount of the unfunded vested benefits attributable to service with the employer and to

determine the employer's share of unfunded vested benefits not attributable to service with employers who have an obligation to contribute under the plan in the plan year in which the employer withdraws.

(5)(A) The corporation shall prescribe by regulation a procedure by which a plan may, by amendment, adopt any other alternative method for determining an employer's allocable share of unfunded vested benefits under this section, subject to the approval of the corporation based on its determination that adoption of the method by the plan would not significantly increase the risk of loss to plan participants and beneficiaries or to the corporation.

(B) The corporation may prescribe by regulation standard approaches for alternative methods, other than those set forth in the preceding paragraphs of this subsection, which a plan may adopt under subparagraph (A), for which the corporation may waive or modify the approval requirements of subparagraph (A). Any alternative method shall provide for the allocation of substantially all of a plan's unfunded vested benefits among employers who have an obligation to contribute under the plan.

(C) Unless the corporation by regulation provides otherwise, a plan may be amended to provide that a period of more than 5 but not more than 10 plan years may be used for determining the numerator and denominator of any fraction which is used under any method authorized under this section for determining an employer's allocable share of unfunded vested benefits under this section.

(D) The corporation may by regulation permit adjustments in any denominator under this section, consistent with the purposes of this subchapter, where such adjustment would be appropriate to ease administrative burdens of plan sponsors in calculating such denominators.

(d) Method of calculating allocable share of employer of unfunded vested benefits set forth in subsection (c)(3) of this section; applicability of certain statutory provisions

(1) The method of calculating an employer's allocable share of unfunded vested benefits set forth in subsection (c)(3) of this section shall be the method for calculating an employer's allocable share of unfunded vested benefits under a plan to which section 404(c) of Title 26, or a continuation of such a plan, applies, unless the plan is amended to adopt another method authorized under subsection (b) or (c) of this section.

(2) Sections 1384, 1389, 1399(c)(1)(B), and 1405 of this title shall not apply with respect to the withdrawal of an employer from a plan described in paragraph (1) unless the plan is amended to provide that any of such sections apply.

(e) Reduction of liability of withdrawn employer in case of transfer of liabilities to another plan incident to withdrawal or partial withdrawal of employer

In the case of a transfer of liabilities to another plan incident to an employer's withdrawal or partial withdrawal, the withdrawn employer's liability under this part shall be reduced in an amount equal to the value, as of the end of the last plan year ending on or before the date of the withdrawal, of the transferred unfunded vested benefits.

(f) Computations applicable in case of withdrawal following merger of multiemployer plans

In the case of a withdrawal following a merger of multiemployer plans, subsection (b), (c), or (d) of this section shall be applied in accordance with regulations prescribed by the corporation; except that, if a withdrawal occurs in the first plan year beginning after a merger of multiemployer plans, the determination under this section shall be made as if each of the multiemployer plans had remained separate plans.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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No. 90-955

In The

Supreme Court of the United States

OCTOBER TERM, 1990

ALMONT SHIPPING COMPANY, INC.,

Petitioner,

v.

PETER BROWNE RUFFIN; WARD KING; JOHN E. DYER; WILLIE SLOAN; WILLIAM PINER; HENRY ARRON ROSE, IN THEIR CAPACITIES AS TRUSTEES FOR THE EMPLOYERS-ILA PENSION, WELFARE & VACATION FUND FOR THE NORTH CAROLINA PORTS AREA,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF PRESTON TRUCKING COMPANY, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER ALMONT SHIPPING COMPANY, INC.

JONATHAN D. SMITH,
PIPER & MARBURY,
36 South Charles Street,
Baltimore, Md. 21201-3010,
(301) 539-2530,
Attorney for Preston
Trucking Company, Inc.

The Daily Record Company
11 East Saratoga Street, Baltimore, MD 21202 – (301) 752-3849

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER ALMONT SHIPPING COMPANY, INC.

Pursuant to Rules 21 and 37.6 of the Rules of the Supreme Court of the United States, Preston Trucking Company, Inc. ("Preston Trucking") moves for leave to file the attached amicus curiae brief in support of Almont Shipping Company, Inc. ("Almont")'s Petition for Certiorari. The respondents to Almont's petition have not consented to the filing of this amicus curiae brief.

As is set forth more fully in Preston Trucking's accompanying Statement of Interest, Preston Trucking is subject to two conflicting interpretations of its obligations under the Multiemployer Pension Plan Amendment Act of 1980, 29 U.S.C. § 1381

et seq. Given its practical involvement in this issue, Preston Trucking respectfully submits that its views would be helpful to the Court in determining whether Almont's Petition for Certiorari should be granted.

Respectfully submitted,

Jonathan D. Smith

Jonathan D. Smith
Piper & Marbury
36 South Charles Street
Baltimore, Md. 21201
(301) 539-2530

Attorney for Preston Trucking Company, Inc.

TABLE OF AUTHORITIES

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No. 90-955

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ALMONT SHIPPING COMPANY, INC.,

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QUESTION PRESENTED

The question presented in this case is whether withdrawal liability (the employer's proportionate share of the plan's unfunded benefits) may be assessed under the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1381 et seq. (MPPAA or "the Act") against an employer who withdraws from a plan whose vested benefits are fully funded.

STATEMENT OF INTEREST OF PRESTON TRUCKING COMPANY, INC. AS AMICUS CURIAE

Preston Trucking, a motor common carrier of general commodities, maintains its headquarters in the State of Maryland. It is authorized to operate in every state of the country, and is now active in 22 states.

Preston Trucking contributes to 27 multiemployer pension plans covering 3,109 employees in these 22 states. Some of these states are in the First Circuit, and thus subject to the First Circuit's decision in Berkshire Hathaway Inc. v. Textile Workers Pension Fund, 874 F.2d 53 (1st Cir. 1989), regarding withdrawal liability under MPPAA; some are in the Fourth Circuit, and thus subject to the Fourth Circuit's recent decision in Wise v.

Ruffin, 914 F.2d 570 (4th Cir. 1990) on this question; and some are in circuits in which this issue has not been addressed. Preston Trucking is thus subject to conflicting determinations with respect to its obligations under MPPAA.

SUMMARY OF ARGUMENT

A conflict exists between the Court of Appeals for the Fourth Circuit and the Court of Appeals for the First Circuit regarding the issue of whether withdrawal liability can be assessed against an employer that withdraws from a multiemployer pension plan if the plan has no unfunded vested benefits as of the last day of the plan year preceding the date of the employer's withdrawal from the plan. The

applicable statutory provisions which govern the determination of withdrawal liability do not clearly answer this question. Thus, the First Circuit, in Berkshire, correctly looked to the legislative history of the applicable statutory provisions and to the Pension Benefit Guaranty Corporation's interpretation of the statutory provisions to conclude that withdrawal liability could not be assessed under these circumstances. The Fourth Circuit, in Wise, erroneously concluded that the applicable statutory provisions clearly answered this question and concluded that withdrawal liability can be assessed under these circumstances.

ARGUMENT

I. THE FOURTH CIRCUIT'S DECISION IN WISE REGARDING WITHDRAWAL LIABILITY UNDER MPPAA IS IN DIRECT CONFLICT WITH THE FIRST CIRCUIT'S DECISION IN BERKSHIRE

The recent Fourth Circuit decision in Wise is in direct conflict with the First Circuit's decision in Berkshire. Both decisions address the issue of whether withdrawal liability can be assessed against an employer that withdraws from a multiemployer pension plan if the plan has no unfunded vested benefits as of the last day of the plan year preceding the date of the employer's withdrawal from the plan.

Sections 4201-4225 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1381-1405, which were added to ERISA by the Multiemployer Pension Plan Amendments Act of 1980

("MPPAA"), are the statutory provisions which govern the determination of withdrawal liability. Section 4201 of ERISA establishes withdrawal liability by providing:

> If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable under this part to be the withdrawal liability.

29 U.S.C. § 1381(a). Withdrawal liability is determined by first computing the amount of unfunded vested benefits allocable to the withdrawing employer under the appropriate method under ERISA § 4211, 29 U.S.C. § 1391, and then adjusting that amount to the extent provided in ERISA §§ 4209, 4206, 4219 and 4225, 29 U.S.C. §§ 1389, 1386, 1399 and 1405. Thus, withdrawal liability is determined by application

of several statutory provisions and is not limited to the application of the applicable method for determining unfunded vested benefits allocable to the employer under ERISA § 4211, 29 U.S.C. § 1391.

In Berkshire, the fund trustee applied a strict reading of ERISA § 4211(c)(4)(B), 29 U.S.C. § 1391(c)-(4)(B), and argued that this statutory provision required the assessment of withdrawal liability against a withdrawing employer if the employer's contribution did not fund the benefits of that employer's participating employees, even if the fund, in the aggregate, was completely funded, and therefore had no unfunded vested benefits as of the last day of the plan year preceding the date of the

employer's withdrawal from the plan. The Court of Appeals for the First Circuit in Berkshire rejected the fund trustee's argument and concluded that the statutory provisions for the direct attribution allocation method of computing withdrawal liability in ERISA § 4211(c)(4), 29 U.S.C. § 1391(c)(4), do not clearly answer the question of whether withdrawal liability could be assessed against a withdrawing employer if the plan had no unfunded vested benefits as of the last day of the plan year preceding the date of the employer's withdrawal from the plan. Therefore, the court looked to the legislative history of MPPAA and to the Pension Benefit Guaranty Corporation's ("PBGC") interpretation of the statutory provisions with respect to

this issue in PBGC Notice of Interpretation, 51 Fed. Reg. 47,342 (1986) ("1986 PBGC Notice"). The court determined that the 1986 PBGC Notice must be given deference and concluded that a withdrawing employer could not be assessed withdrawal liability unless the plan, in the aggregate, had unfunded vested benefits as of the last day of the plan year preceding the date of the employer's withdrawal.

The 1986 PBGC Notice reviewed all of the statutory methods under ERISA § 4211, 29 U.S.C. § 1391, for determining the allocation of unfunded vested benefits to a withdrawing employer. The 1986 PBGC Notice is not limited to a review of ERISA § 4211 only. Rather, the PBGC reviewed all of the statutory provisions for

determining withdrawal liability and concluded that when all of the statutory provisions are read together, the statute is ambiguous with respect to the issue of whether withdrawal liability can be assessed if the plan has no unfunded vested benefits as of the last day of the plan year preceding the date of the employer's withdrawal. The PBGC interpreted the ambiguity by looking for the legislative history of MPPAA and concluded that no withdrawal liability can be assessed in such a case, because to do otherwise would violate the purpose of the statute as evidenced by the legislative history. The PBGC expressly stated that the conclusions expressed in the 1986 PBGC Notice apply to all of the methods under ERISA § 4211, 29 U.S.C. § 1391,

for determining the allocation of unfunded vested benefits to a withdrawing employer.

The Court of Appeals for the Fourth Circuit in Wise was faced with the application of the modified presumptive method of determining withdrawal liability under ERISA § 4211(c)(2), 29 U.S.C. § 1391(c)(2)). Under this method, the determination of an employer's allocable unfunded vested benefits, which is the first step in determining withdrawal liability, is a two-part determination. The first part of this determination was at issue in Wise. This first part provides that the employer's allocable amount of unfunded vested benefits is the product of:

> (i) the plan's unfunded vested benefits as of the end

> of the last plan year ending before September 26, 1980, reduced as if those obligations were being fully amortized in level annual installments over 15 years beginning with the first plan year ending on or after such date; mutilplied by
>
> (ii) a fraction . . .

29 U.S.C. § 1391(c)(2)(B).

The court in <u>Wise</u> limited its focus to this particular provision of the statute and did not review all of the statutory provisions for determining withdrawal liability. The court concluded that ERISA § 4211(c)(2)(B), 29 U.S.C. § 1391(c)-(2)(B), was clear and did not need further interpretation, that the PBGC's contrary interpretation of this issue was to be accorded no deference, and that a review of the legislative intent was not necessary. As a result,

the court concluded that withdrawal liability could be assessed even if the plan had no unfunded vested benefits as of the last day of the plan year preceding the date of the employer's withdrawal.

The decision in Wise is in direct conflict with the decision in Berkshire. Both courts were faced with the identical question of whether withdrawal liability can be assessed against an employer that withdraws from a multiemployer pension plan if the plan has no unfunded vested benefits as of the last day of the plan year preceding the date of the employer's withdrawal from the plan. The courts reached markedly different conclusions.

II. THE FOURTH CIRCUIT'S DECISION IN <u>WISE</u> WAS ERRONEOUS AND SHOULD BE REVERSED.

The court in <u>Berkshire</u> correctly did not limit its determination regarding this question solely on the interpretation of a single subsection of ERISA § 4211, 29 U.S.C. § 1391. Rather, the court determined that the withdrawal liability statutory provisions, in the aggregate, do not clearly answer this question and that the PBGC interpretation of the statutory provisions regarding this question must be given deference. Thus, the <u>Berkshire</u> court correctly held that withdrawal liability cannot be assessed.

The court in <u>Wise</u> erroneously limited its determination regarding this question solely on the

interpretation of a single subsection of ERISA § 4211, 29 U.S.C. § 1391, and concluded that the statutory provision was clear. Thus, the court erroneously determined that the PBGC interpretation of the statutory provisions regarding this question must be given no deference and that withdrawal liability can be assessed.

CONCLUSION

Preston Trucking urges this Court to grant Almont's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit. Preston Trucking further urges this Court to reverse the decision of the Fourth Circuit in Wise

and to support the decision of the First Circuit in Berkshire.

Respectfully submitted,

Jonathan D. Smith
Piper & Marbury
36 South Charles Street
Baltimore, Md. 21201
(301) 539-2530

Attorney for Preston Trucking Company, Inc.